87-2078

JUN 16 1988

JOSEPH F. SPANIOL, JR.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-VIO - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether Union leadership should be held responsible to membership for Union leadership's interpretation of the Union Constitution to that membership when such interpretation later works against said members and to the benefit of said leadership to keep said members from voting on a contract or speaking at the meeting where the Union voted on a contract which eliminated the seniority and recall rights of said members while retaining the recal rights of the members who were allowed to speak and vote at the Union meeting.

2. What are the responsibilities of Labor and Management in the negotiation of an agreement with regard to the protection of minority employees? While Petitioners admit that the company and the Union have the right to negotiate a clause which works to the detriment of minority employees, this case presents a question of whether the company and Union can negotiate two clauses, one for minority employees and one for majority employees.

3. May the company and the Union negotiate a contract eliminating the seniority and recall rights of employees who are not allowed to vote on that contract and then further restrict or limit their earned severance pay by placing limitations on the employee's rights to collect that severance pay.

PARTIES

The Parties herein:

Gordon Panter
J. J. Edrington
John Vogt
Tilford Wagers
R. L. French
Leo Vincent
James Mallory
Joseph Tedescucci
Thomas Pearl
James Burns ..... Plaintiffs

American Synthetic Rubber Corporation

United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 423

United Rubber, Cork, Linoleum and Plastic Workers of America, International Union AFL-CIO, CLC ..... Defendants

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v.

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local Union 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA International Union AFL-CIO, CLC - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported and is reproduced in the Appendix hereto. The decisions of the District Court are unreported and are included in the Appendix herein. All decisions are included in the records designated to this Honorable Court.

JURISDICTION

The nature of this Petition is to challenge the validity of Judgment pursuant to the Labor Management

Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et seq., commonly known as the employee bill of rights, §301 of the Labor Management Relations Act, 29 U.S.C. §185, et seq., as amended; the Employer Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq. (Appendix, *Infra* pp. 28-33).

The Judgment sought to be reviewed is that of the Sixth Circuit Court of Appeals in *Gordon Panter* v. *American Synthetic Rubber Corporation, et al.*, 1988, (Circuit Court Number 87-5233/5839), entered April 25, 1988. (Appendix *infra* pp. 23-24). The decision of the trial court is not officially reported.

The Notice of Appeal was filed February 27, 1987.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States and 28 U.S.C. §2101.

STATEMENT OF THE CASE

1. Petitions were employees of the Respondent Company and members of Respondents' Local Union prior to March 1, 1984. Still at issue is whether the Petitioners continued in their employment after that date. (Stipulation).

2. On or about March 1, 1981, the Respondent Company and Respondent, Local Union entered into an agreement whereby all bargaining unit employees of Respondent Company had unlimited recall rights. (Ex. p. 25).

3. The Petitioners have been on lay-off for varying lengths of time approaching three years as of the time of filing this action. (Stipulation #3).

4. Effective March 2, 1984, the Respondent Company and the Respondent Local Union entered into a new agreement. Under the terms of this new agreement, the Petitioners' seniority and recall rights were ended while those not on lay-off retained unlimited recall rights. (Stipulation #4).

5. Petitioners were not allowed to vote on the new agreement. (Stipulation #6).

6. Petitioners were not allowed to speak on behalf of their interests regarding the new agreement (Stipulation, Testimony Vol. 1, p. 14).

7. The Petitioners had been allowed to speak on behalf of their interests at union meetings up until the presentation of the 1984 agreement to the membership, an agreement which eliminated the seniority and recall rights of Petitioners. (Stipulation, Vol. 1, p. 114).

8. The Company and Union during negotiations prior to notification of the 1984 contract prepared and agreed upon lists of employees who would have unlimited recall rights and those who would have no recall rights under the terms of the 1984 agreement. The list of employees who retained unlimited seniority and recall rights were identical to those employees who were not allowed to vote on the new agreement. (Vol. 1, p. 21, p. 191, Stringfield Testimony, 110, 111, 112).

9. Respondent International Union concurred in the decision that the Petitioners had no right to vote on the new agreement. (Stipulation #7).

10. The first company proposal regarding seniority and recall rights would have applied to all employees of Respondent Company. This proposal was later changed so that it would discriminate and treat Petitioners different than other employees of Respondent Company. (Stringfield, Vol. 1, pp. 104-108, Schmidt, Vol. 1, p. 154).

11. The Petitioners herein, upon their layoff and subsequent to their layoff asked the Union leadership what they had to do to maintain their membership in Respondent Union. In each case, they were informed that they didn't have to do anything, and were told that the Union would take care of their membership. (Burns, Vol. 1, p. 191, Panter, Vol. 1, pp. 48, 49, Edrington, Vol. 1, pp. 81, 82, 85, Vincent, Vol. 1, p. 174, Wagers, Vol. 1, p. 187).

12. Mr. Stringfield, the Union President told Petitioners that they were no longer members of the Local Union in January, 1984. (Panter, Vol. 1, p. 41, Tedeschieci, Vol. 1, p. 71).

13. Petitioners were informed that they would not be allowed to vote or speak regarding the 1984 agreement on March 6, 1984.

14. In January, 1984, Mr. Stringfield told Petitioners that he was not sure whether he represented their interests. (Panter, Vol. 1, p. 46).

15. In late January, 1984, Mr. Stringfield informed Petitioners that he did not represent their interests. (Panter, Vol. 1, p. 47; Edrington, Vol. 1, p. 82; Vincent, Vol. 1, p. 183).

16. The Union leadership had taken a strike vote and were authorized by an overwhelming majority of the membership to call a strike during the 1984 negotiations. (Stringfield, Vol. 1, p. 183).

17. The Petitioners generally were not issued either dues exemption or honorary withdrawal cards. The cards were kept in a drawer at the Union hall.

18. The Company intended to hire new employees immediately upon the signing of the 1984 agreement. (Stringfield, Vol. 1, p. 119).

19. The offer was changed between the first offer and final offer to make it more attractive to the people in the plant, those who would vote on the agreement. (Stringfield, Vol. 1, p. 122).

20. Respondent Local Union and Respondent Company further negotiated a deadline to the Petitioners right to take their severance pay. (Stringfield, Vol. 1, pp. 128-132; Schmidt, Vol. 1, pp. 160, 161).

21. Subsequent to Petitioners being placed in a withdrawal status by the Union, the Union continued to treat them as Union members and represented them in grievance hearings. (Stringfield, Vol. 1, pp. 142, 143).

22. Company officials had heard rumors that the laid off employees would not be allowed to vote. (Schmidt, Vol. 1, pp. 157, 158).

23. At the time of the Petitioners' layoff, the treasurer of the local was Michael Dohoney. It was the job of the treasurer to issue Honorary Withdrawal Cards and Dues Exemption Cards. Mr. Dohoney testified that contrary to the minutes of the Union meeting which stated that he described the difference between the two cards (Respondents' Exhibit 1), he would not have explained the difference between the two cards because he did not understand the difference between the two cards. (Dohoney, Vol. 2, pp. 3, 4, 5).

24. In January, 1984, approximately two months prior to the conclusion of negotiations, Garnell Yarborough, the International Union Representative told Petitioners to take their severance pay and resign their jobs because they would not have jobs in March (1984) (Dohoney, Vol. 2, p. 6). At the time of the layoff of Petitioners, Dohoney did not have a copy of the Constitution of the International Union and was refused a copy when he asked for one. (Dohoney, Vol. 2, p. 15).

25. Mike Dohoney's testimony that while on a layoff and according to the theory of the Union, not a member, he was counted to make a quorum at union meetings and allowed to second motions (Dohoney, Vol. 2, pp. 112, 113) is unrefuted and in fact in some ways suggested by Mr. Stringfield's testimony (Stringfield, Vol. 2, p. 99). Mr. Dohoney also testified that he introduced measures and voted on issues at meetings until January, 1984. (Dohoney, Vol. 2, pp. 112, 113).

26. Petitioners have exhausted all administrative remedies. (Stringfield, Vol. 1, p. 113).

STATEMENT OF ORGINAL JURISDICTION

The Trial Court herein assumed Jurisdiction pursuant to 29 U.S.C. §401 et seq., 29 U.S.C. §185 et seq., and 29 U.S.C. §1001 et seq.; Pendent jurisdiction over State Law Claims.

ARGUMENT

Simply summarizing the facts in the case at hand, a situation is presented wherein the Respondent Company determined that it wanted to rid itself of certain employees who had been laid off from their employment for a period in excess of two years. Under Article VI of the collective bargaining agreement in effect from March 1, 1981, any employee who had greater than two years seniority with Respondent Company had unlimited recall rights from lay off. This provision had been in effect at least since 1959. Petitioners were members of the group who had been laid off from their employment for a period in excess of two years. Petitioners are members of Respondent International Union. Subsequent to their layoff, they had been accorded all privileges of union memberships including the right to speak on behalf of their interest. They generally were not allowed to vote at union meetings, although at least one individual, Mike Dohoney, was allowed to vote, introduce items for a vote, second treasurer's reports and other items.

Subsequent to layoff of Petitioners, they asked the Local Union President, Mr. Stringfield what they had to do to maintain their union membership privileges

and were regularly informed that they did not have to do anything, but that the Union would take care of everything for them.

In January, 1984, Mr. Stringfield met with the Petitioners and told them that the union did not represent their interest at the negotiating table. Mr. Stringfield told them that they were not union members. Mr. Stringfield informed Petitioners that the Company was going to demand the recall rights of Petitioners and that the Union was going to deny the Petitioners the right to vote on the agreement. Mr. Yarbrough, International Union Representative told Plaintiffs to take their severance pay from the company—this was said, in spite of the fact that two months of negotiations remained on the agreement.

In January, the Company and the Union met to trade proposals. The first Company proposal on the issue of seniority and recall rights would have eliminated the recall rights of all employees after one year layoff. In subsequent negotiating sessions, the Company and Union developed a system of total and complete discrimination. The Petitioners and others similary situated who were not allowed to vote were to be terminated, while those who would be allowed to vote on the agreement would retain unlimited recall rights. The Company and the Union then developed two lists. On one list were those employees who would be allowed to vote on the new agreement and who would retain unlimited recall rights. On the other list were the employees, including Petitioners, who would not be allowed to vote on the new agreement, and who

would be stripped of all their seniority and recall rights, rights earned by an average of over twenty years service.

With the above plan in effect, Mr. Stringfield denied the Petitioners and others similarly situated the rights to speak on behalf of their interest at the meeting where the contract was ratified. This was the first and only time that anyone similarly situated to Plaintiffs had been refused the right to speak on behalf of their interests at a Union meeting.

VIOLATIONS OF THE LAW

A. The actions of the Respondents/Appellees violate the rights of Petitioners/Appellants as established by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq., commonly known as the "Employee Bill of Rights."

Under the terms and conditions of this statute, the Petitioners must be granted a right to speak on behalf of their interests and vote on issues which affect them directly. *Alvey* v. *General Electric Company*, 622 F. 2d 1979 (7th Cir. 1980) in a case which is very nearly identical to the case before the Court. In that case, certain laid off employees were not permitted by their Union to vote on issues which directly affected their rights of recall and seniority rights. The Court in *Alvey, supra,* determined that the Union could refuse laid-off employees the right to vote or speak at Union meetings with the exception that they could not be refused the right to vote on issues which directly affect their interest. The Court then determined that changes

in the seniority and recall rights of individuals involved in that case directly affected their interest and ruled that they should have been allowed to vote thereon and speak on behalf of their interest pursuant to the Labor Management Reporting and Disclosure Act.

The defense of Respondent Local Union to this argument seems to be that Petitioners had been issued Honorary Withdrawal Cards under the terms of the Union Constitution and that according to the Constitution, the Petitioners were not entitled to vote on the labor agreement.

Under §101 et seq. of the Labor Management Reporting and Disclosure Act, and the ruling in *Alvey* v. *General Electric Co., supra,* the Petitioners were entitled to vote on the agreement and the Union's refusal of this right to vote constitutes a breach of law. See also *Christopher* v. *Safeway Stores, Inc.,* 103 LRRM 2017 (E.D. TX., 1979) in which the Court determined that the Union violated the Labor Management Reporting and Disclosure Act by changing seniority rights without allowing affected employees a right to vote thereon.

Any restriction on the voting rights of Petitioners must be reasonable. See *Johnson* v. *General Motors,* 641 F. 2d 1074 (2nd Cir., 1981); *Clayton* v. *U.A.W.,* 101 S. Ct. 1743, 20 L. Ed. 2d 763 (1968). Enforcement of the constitution against the Petitioners in the case herein is unreasonable. The transcript contains exhaustive testimony to the effect that Petitioners were misled by the Union leadership regarding their membership status. The Petitioners were informed by the

Local Union President, Mr. Max Stringfield, said that they did not have to do anything to maintain their membership, that the Union would take care of them. Mr. Dohoney, the union official who was charged with informing the Petitioners of the existence and explanation of a dues exemption card and honorable withdrawal card testified that he did not know the difference between the two types of cards. The cards were not distributed to the membership. The only evidence offered by Respondent Union to refute Petitioners' claim that they were not informed of the existence of a Dues Exemption Card were the minutes of a union meeting which stated that Mr. Dohoney informed the members of the difference between a dues exemption card and an honorable withdrawal card and Mr. Stringfield's testimony that he informed the membership at every meeting of the difference between the two cards. Mr. Dohoney directly refuted the minutes of the meeting, testifying that he could not explain the difference between the two cards he did not know the difference.

Mr. Sringfield's testimony stretches the bounds of believability first when he testified that he informed the membership at every meeting of the difference between two cards and second by his own subsequent testimony that no minutes exist of any meeting where he informed the membership of the difference between the two cards.

Mr. Stringfield himself seemed to be confused when confronted with the question of the voting rights of Petitioners. In January, 1984, he sought advice from the International Union regarding this question.

Finally, the best proof was how the Union treated these individuals. It is unrefuted in the record by any competent testimony that Mr. Dohoney, while holding an Honorable Withdrawal Card, was permitted to introduce measures to the membership for a vote, second motions, be counted toward a quorum and vote on issues before the Union. It is agreed by all that the Union represented these employees in grievance hearings and before government agencies, that they were permitted to attend Union meetings and to speak on behalf of their interest.

The only time that the questions of dues exemption cards and honorable withdrawal cards arose was two years after the layoff of Petitioners in January, 1984, when the Company decided to do away with the seniority and recall rights of the Petitioners. The Petitioners and others granted honorable withdrawal cards had always been permitted to speak at membership meetings with the only exception being that incident which was of most importance to the Petitioners that incident wherein they were prejudicially stripped of their seniority and recall rights while those individuals who were allowed to vote retained unlimited recall rights. The actions described herein, as well as the Union's refusal to allow Petitioners to vote on a Pension Agreement which affected the probability that Petitioners would be recalled, violates the rights of Petitioners as guaranteed by the Labor Management Reporting and Disclosure Act.

B. The Actions of Respondents violated the Rights guaranteed Petitioners/Appellants as guaranteed by §301 of the Labor Management Relations Act as amended.

Pursuant to § 301 of the Labor Management Relations Act of 1947, the Union owed a duty of fair representation to the Petitioners.

The Respondents in their bargaining, separated Petitioners and others similarly situated from the main body of employees, and wrote a separate contract clause covering the Petitioners. Petitioners who were not permitted to vote on the agreement had their seniority and recall rights revoked. Those individuals who were allowed to vote were specifically exempted from the provisions of the agreement whereby the Petitioners were terminated by the Company. In *Cannon* v. *Consolidated Freightways Corp.*, 524 F. 2d 290, 293, 99 LRRM 2996 (7th Cir., 1975), the Court states:

> "To prove arbitrary or discriminatory treatment, the Plaintiff must show that the union's conduct was intentional, inviduous and directed to that particular employee."

In the case before the Court, two distinct groups of employees existed at Respondent Company, those who were actively employed and those who had been laid off for over two years. The Company and the Union negotiated Article VI, Section 3(h) which states as follows:

> "3. Seniority shall be terminated for the following reasons:

(h) FAILURE OF AN EMPLOYEE ON LAY OFF STATUS TO BE RECALLED WITHIN TWO YEARS OF HIS DATE OF LAYOFF (EXAMPLE: EMPLOYEES ON LAYOFF STATUS AS OF 3/1/84, WHO WERE LAID OFF ON 3/1/82, SHALL BE TERMINATED EFFECTIVE 3/1/84). HOWEVER, THIS PARAGRAPH DOES NOT APPLY TO ANY EMPLOYEE ACTIVELY EMPLOYED OR WHO IS RECEIVING ACCIDENT & SICKNESS BENEFITS ON 3/2/84."

We are not discussing a contract clause which is applied equally to all, but is simply detrimental to one group of employees. The issue in this case is a contract clause which is *per se* discriminatory, a contract clause which, on its face, treats two groups of employees completely different.

The law regarding discrimination against members of the bargaining unit is so firmly established that the Court could almost take judicial notice that the actions of the Respondents herein are discriminatory and in violation of the law. The Supreme Court in *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 65 S. Ct. 226 89 L. Ed. 173 (1944). See also, *Vaca* v. *Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

See also *Boston Brands, Ltd.* v. *NLRB,* 529 F. 2d 793, 91 LRRM 2241 (7th Cir., 1976). In that case which involved the dovetailing of seniority the Court stated:

"[A union's] decision may not be made solely for the benefit of a stronger more politically favored

> group over a minority group. To allow such arbitrary decisions making is contrary to the union's duty of fair representation."

These actions of Respondents violate the rights of Petitioners as protected by §301 of the Labor Management Relations Act. The blatant discrimination against Petitioner is a violation of that act, and of the duty of the Union to properly represent the rights of the Petitioners in negotiations. Inasmuch as the agreement is in violation of the law, it is void and cannot be enforced to the detriment of the Petitioners.

C. The Seniority Rights of Petitioners/Appellants are Status Benefits Which Cannot be Eliminated Without the Apploval of the Petitioners/Appellants

The unlimited recall rights of Petitioners and others similarly situated have been in effect since at least 1959. In *U.A.W. v. Yard-Man, Incorporated,* 716, F. 2d 1476 (6th Cir., 1983) Cert. Denied 1045 S. Ct. 1002 (1984), the Sixth Circuit Classified certain benefits as "Status Benefits."

> "Further, retiree benefits are in a sense 'status benefits' which as such carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.* at 1482.

In the instant case, certain seniority statuses were created by the agreement in effect between 1959 and 1983. First, under Article VI, Section 7, a laid off employee who has two years or less of seniority and who is recalled within five (5) years from the date of his layoff shall be given his previous seniority plus seniority credit for the time laid off provided such seniority does not exceed his actual seniority time at lay off.

The second paragraph of Article VI, Section 7, creates the second seniority status, the status attained by Petitioners-Appellants.

That paragraph states:

> "A laid off employee who had more than two years of seniority at the time of layoff and who is recalled at any time shall be given his previous seniority plus seniority for the time laid off provided such seniority does not exceed two years for any single period of layoff."

In *U.A.W. v. Yardman, Supra*, at 1479, the Court determined that:

> "Whether . . . benefits continue beyond the expiration of the colective bargaining agreement depends upon the intent of the parties. Clearly the collective bargaining agreement may provide for rights which will survive termination of their collective bargaining relationship . . . For instance, the Court shall first look to the explicit language for clear manifestations of intent." See also *International Union v. Malleable Iron Co., Inc.*, 135 CR 7 (6th Cir., 1984).

The 1981 Agreement under which Petitioners were laid off was effective March 1, 1981 and expired February 29, 1984. The contract was, therefore, a three-year agreement. The first seniority status herein covers a period of seven years, two years to obtain seniority and five years of recall rights. The second status cover an unlimited period, that being two years of seniority plus unlimited recall rights.

It is clear, therefore, from the language of Article VI, Section 7, that the seniority provisions of the agreement were intended to survive the three year agreement.

D. The Action of Respondents/Appellees in Severely Limiting Petitioners/Appellants' Severance Rights at the very time they became payable is a violation of the Employee Retirement Income Security Act (ERISA 29 U.S.C. §1001 et seq.

Respondent Company claims to have terminated Petitioners 3/1/84 at 11:59 p.m. according to an agreement with Respondent Union. This agreement only applied to Petitioners. (Exhibit "A" to More Definite Statement) During Petitioners' employment with Respondent Company, Petitioners accumulated a vested severance pay as provided by Article XVIII of the labor contract between Local 423 and A.S.R.C.

Employees were sent letters by Respondent Company notifying them of their termination and demanding that they request their severance pay. (Exhibit "C" to More Definite Statement). In Order to receive their severance pay, employees were forced to sign a

statement waiving all seniority and recall rights and removing their names from the seniority roster, and in effect, giving up their right to bring the lawsuit that is currently before the Court. (Exhibit "D" to more Definite Statement).

One of the Petitioners, J.J. Edrington requested severance pay, but refused to sign the company prepared document in his and instead prepared his own request. Said request was neither denied nor granted by the Respondent Company.

No individuals other than Petitioners and others who were subject to termination 3/1/84 had ever been required to sign a document or request their severance pay from Respondent Company. No individuals other than Petitioners have ever been given a deadline by Respondent company by which time they were required to request their severance pay.

Severance pay plans are subject of the provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq. See Department of Labor Regulations at 29 C.F.R. §2510.3-1(a). See also *Gilbert* v. *Burlingtons Industries*, 765 F. 2d 320 (2d Cir., 1985) and *Scott* v. *Gulf Oil Corp.*, 754 F. 2d 1499 (9th Cir., 1985).

The actions of Respondent Company were arbitrary and capricious and were an attempt to coerce and manipulate the Petitioners and others who were subject to termination 3/1/84 to sign away any claim to any legal action against Respondent Company and the Respondent Union regarding loss of seniority rights,

all of which is in violation of ERISA, 29 U.S.C. §1001, et seq., including but not limited to 29 U.S.C. §1140 and 20 U.S.C. §1141.

The case before the Court involves very simply the type of manipulation of benefits that ERISA was designed to protect against. Severance Pay Benefits were manipulated and strings were attached to the exact time that these benefits became payable.

The March 2, 1984 letter from William J. Mingus is an example of the Company's attempt to manipulate the system. The letter informs the employee that he was terminated from American Synthetic Rubber Corporation effective March 2, 1984. The Union ratification election on the contract in which Petitioners were terminated was not even held until March 6, 1984, four days after the letter was written. *At the time the letter was written terminating Petitioners, the Petitioners could not have been terminated. The Union still had an opportunity to reject the Company's contract proposal and strike for Petitioners' seniority and recall rghts.*

Employees requesting seniority pay immediately prior to March 2, 1984 were required to request severance pay and sign away their seniority and recall rights, in specific violation of the plan in effect at that time.

Denial of severance benefits to Mr. J.J. Edrington (Exhibit "B" to Response to Respondent American Synthetic Rubber Corporation's Motions to Dismiss) very clearly demonstrates the illegal intentions of the

Respondents. Mr. Edrington requested his severance pay in writing, stating only that he did not waive his rights under the contract or the law. The Company did not pay Mr. Edrington's severance pay.

The agreement entered into between the Company and the Union (Exhibit "C" to Respondent American Synthetic Rubber Corporations' Motion to Dismiss) requires that the employee request his severance pay in accordance with Article XVIII of the 1981 agreement. Article XVIII of the 1981 Agreement did not require that any written request be made by the employee.

The Petitioners have stated a prima facia violation of ERISA. Their claim is supported by the documentary evidence of record in this case. The Judgment of the Trial Court should be awarded to Petitioners.

CONCLUSION

For the reasons set forth herein, the Court shall hear the argument of Petitioners that the Judgment of the Trial Court must be set aside and the Judgment must be awarded to the Petitioners herein or, in the alternative, the case must be remanded to the Trial Court for a trial by jury.

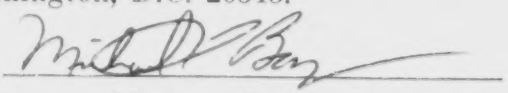
Respectfully submitted,

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CERTIFICATION

It is hereby certified that a copy of the foregoing Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals was mailed this 22nd day of June, 1988, to Hon. C. Laurence Woods, III, 501 South Second Street, Louisville, Kentucky 40202, to the Hon. John Frith Stewart, 300 Marion E. Taylor Bldg., Louisville, Kentucky 40202, and to Mr. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543.



MICHAEL L. BOYLAN

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 87-5233/5839

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GORDON PANTER, et al., - - - *Plaintiffs-Appellants,*

v.

AMERICAN SYNTHETIC RUBBER CO., et al., - - - - - - Defendants-Appellees.

On Appeal from the United States District Court For the Western District of Kentucky

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Decided and Filed April 25, 1988

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and GILMORE,* District Judge

PER CURIAM. Plaintiffs-appellants Gordon Panter and nine other former employees of American Synthetic Rubber Corp. (ASCR), all of whom were also former members of the United Rubber, Cork, Linoleum and Plastic Workers of America International Union and its affiliate Local 423 (the Unions), have appealed from the district court's grant of summary judgment for defendants ASRC and the Unions on all issues in this action alleging violations of the Labor Management Relations Act, 29 U.S.C. § 185 (the LMRA), the Labor Management Reporting and Disclosure

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*Hon. Horace Gilmore, United States District Judge, Eastern District of Michigan, sitting by designation.

Act, 29 U.S.C. § 401 (LMBDA), the Kentucky Age Discrimination statute, and ERISA.

Upon consideration of the entire record, the briefs filed by the respective parties, and the contentions raised at oral argument, this court AFFIRMS the decision of the district court for the reasins stated by Judge Allen in his Memorandum Opinions of December 17, 1984, November 1, 1985, May 1. 1986 and September 5, 1986.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293-L(A)

GORDON PANTER, et al., - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION AND ORDER

This action is before the Court on Defendant's American Synthetic Rubber Corporation, motion for summary judgment on the ground that Plaintiff Edrington failed to exhaust his contractual remedies, and Plaintiff's motion to set aside the judgment entered in this case an September 5, 1986, dismissing all claims against Defendants with the exception of Edrington's claim against ASRC for severance pay. The Court will discuss Plaintiff's motion first.

Plaintiffs' complaint alleges that Defendants violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* by denying their claims to severance pay. In March 1984 Defendant ASRC and Defendant United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 423 ("Union"), which is affiliated with Defendant United Rubber, Cork, Linoleum and Plastic Workers of America, International Union, AFL-CIO, CLC, negotiated a new collective bargaining agreement. Under that agreement, all employees who had been laid-off for more than two years lost their right to recall. Under the

former agreement, laid-off employees with two or more years of seniority retained recall rights no matter how long they had been on layoff unless they requested and received severance pay. Under the new agreement Union members would have forty-eight hours after the new contract was ratified in which to request severance pay.

J.J. Edrington was the only plaintiff in the instant case who requested severance pay. Both the new contract and the old contract provided that employees who decided to take severance pay would lose their seniority and recall rights upon receipt of the severance pay.

The Court rejected Plaintiff's contention that Defendant violated ERISA. Under *Sutton* v. *Weirton Steel*, 724 F. 2d 406 (4th Cir. 1983), employees' rights to severance pay may be modified without violating ERISA and must be governed by employment agreements. The Court, therefore, held that the right to severance pay was subject to negotiation between the Union and the ASRC and refused to interfere with that agreement. The Court dismissed all claims against the Unions and all claims against ASRC, with the exception of Edrington's.

The Court will sustain its September 5, 1986, order. Plaintiffs did not pay Union dues or seek dues exemptions while on layoff and therefore forfeited their Union membership and lost their rights to participate in the ratification vote of the contract. Further, the Union gave Plaintiffs advance notice that they would not be allowed to participate in the ratification vote and advised the Plaintiffs to obtain an attorney to represent their interests.

Next, ASRC's motion for summary judgment on the ground that Edrington failed to exhaust his administrative remedies under the collective bargaining agreement will be granted. Edrington claims that ASRC has failed to pay his severance pay in violation of the new contract. Edring-

ton, however, did not make use of the grievance and procedures provided in Article V of that agreement, which culminates in arbitration. Edrington's claim is based upon a breach of the collective bargaining agreement and he is bound by the terms of that agreement as it governs the manner in which contractual rights may be enforced.

Althoug Edrington argues that ASRC's motion should be denied because it would have been futile for him to have pursued his contractual remedies and that he should, therefore, be excused from doing so, the courts insist upon a clear showing of futility before excusing a failure to exhaust. *Miller* v. *Chrysler Corp.*, 748 F. 2d 323 (6th Cir. 1984). In the instant case, the Union's president negotiated for Plaintiff's rights to apply for severance pay and there is no indication that the Union would have been hostile toward Edrington's grievance.

Accordingly,

It Is Ordered that Plaintiffs' motion to set aside the Court's September 5, 1986 order be, and it hereby is, denied.

It Is Further Ordered that Defendant ASRC's motion for summary judgment be, and it hereby is, granted.

It Is Further Ordered that Plaintiff J.J. Edrington's complaint against ASRC be, and it hereby is, dismissed with prejudice.

This is a final and appealable order and there is no just cause for delay.

Dated _____

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

§ 185. Suits By and Against Labor Organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting comerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

§ 401. Congressional declaration of findings, purposes, and policy

(a) Standards for labor-management relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Natiou; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) Protection of rights of employees and public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to eliminate or prevent improper practices

The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended [29 U.S.C.A. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate comerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to ade-

quate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanc-, tions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to meet minimum standards of funding, and by requiring plans termination insurance.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

§ 1141. Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.]. Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.

(2)

No. 87-2078

Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-CIO - - - Respondents

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

BRIEF OF AMERICAN SYNTHETIC RUBBER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries and affiliates of American Synthetic Rubber Corporation.

The following companies have a minority ownership interest in American Synthetic Rubber Corporation:

1. American Hoechst Corporation
2. Chromalloy American Corporation
3. Converse Rubber Corporation/A Division of Electra
4. Dunlop Tire & Rubber Corporation
5. Goodall Rubber Company
6. Pickens Footwear
7. W. R. Grace & Company
8. Hewitt-Robbins/A Division of Litton Industrial Systems, Inc.
9. Lacrosse Rubber Mills Company
10. Michelin Corporation
11. Norbalt Rubber Corporation
12. Rubbermaid Incorporated
13. Dart Industries, Inc.
14. Simplex Wire & Cable Company

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No. 87-2078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - *Petitioners*

versus

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UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-CIO - - Respondents

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF AMERICAN SYNTHETIC RUBBER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

In March 1981, Respondents American Synthetic Rubber Corporation (ASRC) and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 423 (Union) negotiated a three year collective

bargaining agreement. Under that agreement, employees who had more than two years of seniority retained recall rights no matter how long they remained laid off. The agreement also provided for severance pay upon lay off. However, under the agreement, an employee who received severance pay forfeited all his seniority and recall rights. (R. 51 and 65).[1]

Petitioners were employed by ASRC. They were represented for collective bargaining purposes by the Union. Petitioners, as well as a number of other employees, were laid off in 1981 as a result of ASRC's decision to close part of its manufacturing facility.

In March, 1984, the Union and ASRC negotiated a new collective bargaining agreement. In those negotiations one of ASRC's initial proposals was to change the agreement so as to terminate the seniority and recall rights of any employee after a period of layoff of more than one year. The Union and ASRC eventually agreed that seniority and recall rights would be terminated after a period of layoff of two years or more. The provision excluded active employees as well as those on medical leaves of absence. (R. 114).

The Union and ASRC further agreed that when the 1981-84 contract expired and was replaced by the 1984-87 contract, those employees who had been on layoff more than two years would automatically lose their seniority and recall rights. Since, under both contracts, the relinquishment of seniority and recall rights

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[1]All citations are to the Joint Appendix which is a part of the record before the Sixth Circuit Court of Appeals.

was a quid pro quo for the receipt of severance pay, those employees would have no right to severance pay once the 1984-87 contract became effective. (R. 72 and 217).

A meeting was scheduled by the Union for March 7, 1984, with ASRC's employees for the purpose of voting to ratify the contract. (R. 296). In order to give the laid off employees, who would lose their seniority under the new contract, time to await the results of the ratification meeting, the Union and ASRC agreed that they would have until March 9, 1984 at 6:00 p.m. to apply for their severance pay. The Union and ASRC also agreed that if the employees did not apply for their severance pay before that time they would lose any right to severance pay. (R. 215-216). All employees on layoff were given notice that they had to apply for severance pay by that time or they would lose their right to severance pay. (R. 118).

On March 7, 1984, the Union membership ratified the contract by a vote of 79 to 7. (R. 296). By 6:00 p.m. on March 9, 1984, all employees who were laid off had requested their severance pay, except Petitioners. (R. 52).

On March 9, 1984, Petitioners filed suit in the United States District Court for the Western District of Kentucky. The Complaint alleged that the Union and ASRC violated the Labor Management Relations Act (LMRA), 29 U.S.C. Section 185(a) and the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. Section 401 *et seq.* by negotiating a contract

which infringed on Petitioners' seniority and recall rights. (R. 14-23).

On March 22, 1984, Petitioners filed an Amended Complaint. (R. 28-38). It added a claim that the Union and ASRC violated the Kentucky Civil Rights Act, KRS Chapter 344, by discriminating against the Petitioners on the basis of their age.

On April 24, 1985, Petitioners moved for leave to file a Second Amended Complaint. The District Court denied this motion but allowed Petitioners to file a Third Amended Complaint. (R. 39-44). It raised another new claim. Petitioners alleged that ASRC and the Union conspired to deprive them of their severance pay benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 *et seq.*

The District Court granted summary judgment to the Union and ASRC on each of Petitioners' claims by various orders and memoranda entered throughout the course of the litigation. On December 17, 1984, the District Court granted ASRC's motion for summary judgment on Petitioners' age discrimination and Section 301 claims. The Court denied Petitioners' Motion for a Preliminary Injunction and the Union's motion for summary judgment on the Petitioners' LMRDA claim. (R. 69-94).

On November 1, 1985, the Court granted ASRC's motion for summary judgment on Petitioners' claim under the LMRDA as it related to ASRC. (R. 65-68).

On May 1, 1986, the Court denied the Union's renewed motion for summary judgment and granted

ASRC's with respect to all of Petitioners' claims except the allegation that ASRC had violated ERISA. (R. 59-63).

On September 5, 1986, the Court granted the Union's motion for summary judgment on the LMRDA claims. The District Court also granted ASRC's motion to dismiss Petitioners' claim for severance pay under ERISA. The sole claim remaining before the Court, at this point, was that of Petitioner J.J. Edrington, who alleged that he had applied for his severance pay prior to the March 9, 1984, deadline, but had not been paid. (R. 50-58).

On February 9, 1987, the District Court denied Petitioner's motion to set aside its September 5, 1986, Order. It also granted ASRC's motion to dismiss Edrington's claim on the basis that he failed to exhaust the administrative remedies available to him under the collective bargaining agreement. (R. 46-49).

On February 27, 1987, Petitioners filed a Notice of Appeal. (R. 45). After briefs were filed and oral argument was held, the Sixth Circuit Court of Appeals affirmed the District Court's decision. A per curiam order was entered on April 25, 1988.

Petitioners have now requested this Court to review the Sixth Circuit Court of Appeals' decision.

SUMMARY OF ARGUMENT

Supreme Court Rule 17.1 provides that certiorari will be granted "only when there are special and important reasons therefor." Petitioners have presented no special or important reason that would justify the

granting of certiorari in this case. The District Court properly granted summary judgment on Petitioners' claims and the Sixth Circuit Court of Appeals properly affirmed.

ARGUMENT

A. Petitioners Have No Claim Against ASRC Under The Labor Management Reporting and Disclosure Act. 29 U.S.C. Section 401 *et seq.*

Petitioners' argument under the LMRDA focuses upon the Union's alleged violations of this statute. The District Court properly granted summary judgment to ASRC on the basis that the LMRDA "does not apply to employers but only to the relationship between the Union and its members." (R. 66). The statute does not provide for a cause of action against an employer. See, *Thompson* v. *New York Central Railroad*, 361 F. 2d 137 (2nd Cir., 1966) and *Duncan* v. *Peninsula Shipbuilders Assn.*, 394 F. 2d 237 (4th Cir., 1968).

Petitioners do not contend that the District Court erred in granting summary judgment to ASRC on their claims under the LMRDA. Accordingly, there is no reason for granting certiorari on this claim with respect to ASRC.

B. Petitioners Have No Claim Against ASRC Under Section 301 Of The Labor Management Relations Act, 29 U.S.C. Section 185a *et seg.*

Petitioners' argument under Section 301 of the LMRA focuses upon the Union's alleged breach of its duty of fair representation. Petitioners have no claim against ASRC under Section 301.

In the original and Amended Complaint in this case, Petitioners admitted that the collective bargaining agreement, which was the source of their recall and seniority rights, expired on March 1, 1984. (R. 16 and 31).

Accordingly, Petitioners have not and cannot allege that there has been a breach of a collective bargaining agreement. Absent an alleged breach of a collective bargaining agreement, federal courts do not have jurisdiction under Section 301. *Hayes* v. *Consolidated SVC Corp.*, 517 F. 2d 564 (1st Cir., 1975).

Again, Petitioners have presented no reason which would justify the granting of certiorari with respect to ASRC on their claims under Section 301 of the LMRA.

C. Petitioners' Seniority Rights Were Not "Status Benefits".

Petitioners contend that their recall and seniority rights under the 1981-84 collective bargaining agreement were "status benefits" which could not be altered by ASRC and the Union. Petitioners' argument is without merit and provides no reason for the grant of certiorari in this case.

In support of their argument, Petitioners rely exclusively on the Sixth Circuit of Appeals decision in *U.A.W.* v. *Yardman, Incorporated,* 716 F. 2d 1476 (1983), *cert. den.* 465 U.S. 1007 (1984). *Yardman* is inapposite. In *Yardman,* the employer, after the expiration of the collective bargaining agreement, terminated the life and health insurance benefits which

the agreement had provided retirees. The union sued under Section 301, on behalf of the retired employees, contending that the company was obligated to pay the retirees' life and health insurance even after the contract's termination.

The Sixth Circuit Court of Appeals agreed. In framing the issue to be decided, the Court stated, "whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties." As the Court recognized, "the parties to a collective bargaining agreement may provide for rights which will survive termination of their contractual relationship." *Id.*, at 1479.

To determine the parties' intent, the Court indicated that the language of the agreement, as well as the context in which it was negotiated, must be examined. In upholding the union's claim, the Court found that the language of the agreement demonstrated an intent that the retirees' insurance benefits would continue after the expiration of the contract. In further support of its conclusion, the Court held that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.*, at 1482.

Yardman does not support Petitioner in this case. *Yardman* involved a dispute over the interpretation of ambiguous language in a collective bargaining agreement. The union claimed the language created a

vested right to insurance benefits. The employer argued it did not.

In this case, on the other hand, there is no contention that Petitioners' recall or seniority rights turn upon the interpretation of ambiguous language. There is no dispute between ASRC and the Union as to the meaning of the language governing these rights. The Union and ASRC, through negotiations, agreed to a provision which clearly eliminated Petitioners' seniority and recall rights. Thus, there is no reason to engage in contract interpretation in order to determine ASRC's and the Union's intent.

The legal issue in this case, which was not present in *Yardman,* is whether ASRC and the Union had the right to eliminate Petitioners' seniority. ASRC and the Union had the right to make such a modification. In fact, courts have uniformly held that seniority rights are not vested benefits and, thus, are subject to modification through collective bargaining. *Charland* v. *Norge Division, Borg-Warner Corporation,* 407 F. 2d 1062 (6th Cir., 1969) and *Local 1251, United Automobile Workers* v. *Robertshaw Controls Co.,* 405 F. 2d 29 (2nd Cir., 1968). This Court recognized as much in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953) wherein it was held that a union has the authority and discretion to negotiate seniority provisions which affect employees differently.

Petitioners' argument that their seniority and recall rights were "status" benefits not subject to change presents no reason for the grant of certiorari.

D. ASRC Did Not Violate The Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*, In Limiting Petitioners' Right To Severance Pay.

Petitioners' final argument is that ASRC and the Union violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 *et seq.* Petitioners' argument is legally baseless and presents no reason for granting certiorari.

The District Court properly granted summary judgment to ASRC on Petitioners' severance pay claims. Provisions concerning severance pay are "employee welfare benefit plan[s]" as defined by ERISA. 29 U.S.C. Section 1002(1). The "vesting" requirements of ERISA do not apply to benefits provided by "employee welfare benefit plan[s]." 29 U.S.C. Section 1051(1). Also see, *White Farm Equipment Company* v. *White Motor Corp.*, 788 F. 2d 1186 (6th Cir., 1986). Since severance benefits are not vested, they are subject to modification through collective bargaining. *Sutton* v. *Weirton Steel Division of National Steel Corporation,* 724 F. 2d 406 (4th Cir., 1983), *cert. den.* 467 U.S. 1205 (1984).

The only provisions of ERISA Petitioners claim ASRC violated are 29 U.S.C. Section 1140 and 1141. Section 1140 only applies to and protects vested rights. It affords no protection to unvested benefits such as severance pay. *Sutton, supra,* at 410-411. Section 1141 of ERISA is a criminal provision which provides no civil cause of action. *West* v. *Butler,* 621 F. 2d 240, 244 (6th Cir., 1980).

Petitioners also argue that ASRC's actions in limiting their right to severance pay were arbitrary and capricious. The arbitrary and capricious standard of review is imposed by ERISA on administrators of a pension or welfare plan. 29 U.S.C. Section 1104. Also see, *Gordon* v. *IBWU-PMA Benefit Funds,* 616 F. 2d 433 (9th Cir., 1980). Such fiduciary requirements only apply in connection with the administration of employee benefit plans. They do not apply to a modification or termination of a plan which does not provide vested benefits. *Sutton, supra,* at 410-411; *Phillips, supra;* and *Flight Officers* v. *United Air Lines,* 756 F. 2d 1262 (7th Cir., 1985).

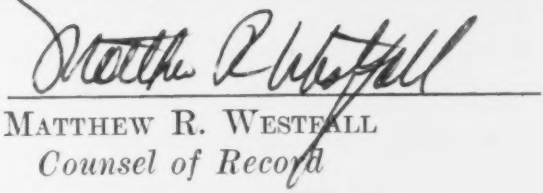
ASRC and the Union had the right under ERISA to agree that Petitioners would not be entitled to severance pay if it was not requested before 6:00 p.m. on March 9, 1984. The District Court properly held that there was no violation of ERISA and granted summary judgment to ASRC on that basis. Petitioners have presented no reason why the District Court was incorrect.

Petitioners mention that J.J. Edrington requested severance pay before the March 9, 1984 cutoff date. (pp. 18-19). The District Court's summary judgment on Edrington's claim for severance pay did not involve ERISA. Rather, Edrington's claim was dismissed because he failed to exhaust the administrative remedies available to him under the collective bargaining agreement. (R. 48). This decision was proper under *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965).

As with Petitioners' other claims, their arguments based upon ERISA present no reason for this court to grant certiorari.

CONCLUSION

In light of the foregoing, American Synthetic Rubber Corporation requests that this petition be denied.



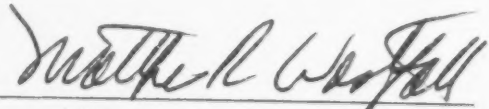
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CERTIFICATE

It is hereby certified that a copy of the foregoing has been served by mail pursuant to Supreme Court Rule 28.3 upon Michael Boylan, Counsel for Petitioners, 807 W. Market Street, Louisville, Kentucky 40202; John Frith Stewart, 300 Marion E. Taylor Bldg., Louisville, Kentucky 40202 and Paul Malesick, 87 S. High Street, Akron, Ohio 44308, Counsel for Respondent Unions.



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(3)

No. 87-2078

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-CIO-CLC - - Respondents

UNIONS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in the petition are these:

1. Are laid-off employees who have allowed their union membership to lapse eligible to participate in the ratification of a new collective bargaining agreement between their former union and their former employer?

2. Are the negotiated recall rights of laid-off employees protected from modification through subsequent collective bargaining?

3. Does a collectively-bargained entitlement to severance pay survive the expiration of the collective bargaining agreement that created the entitlement?

4. Does an exclusive bargaining representative breach its duty of fair representation by negotiating and ratifying a new collective bargaining agreement with the employer of the employees in its bargaining unit?

Each issue should be answered in the negative.

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No. 87-2078

IN THE

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October Term, 1988

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v.

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, INTERNATIONAL UNION AFL-CIO-CLC - *Respondents*

UNIONS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

Most of the written decisions of the United States District Court for the Western District of Kentucky were omitted from the appendix attached to the petition. The omitted decisions are appended to this brief as Appendix A.

PERTINENT STATUTES AND REGULATIONS

In addition to the statutes specified in the petition, this case involves the application of the statutes and

regulations listed below and reproduced in Appendix B: 29 U.S.C. §§402(o), 411, 412, 1002(1) and 1051(1); 29 CFR §§452.86, 452.92.

STATEMENT OF THE CASE

Under the provisions of Article VII, §5(a)(4), of the Unions' Constitution, the Respondent Unions "shall" issue an Honorable Withdrawal and Transfer Certificate to a union member "who is laid off and fails to request dues exemption in accordance with Article VI, §3, Paragraph (b). . . ." Article VII, §5(d), of the Constitution provides that "[m]embers to whom Honorable Withdrawal and Transfer Certificates have been issued forfeit all rights and privileges in the Local Union and the URW."

Under the provisions of Article VI, §2, of the Consituation, each member of the Unions must make a monthly dues payment to the Unions. Article VII, §3, provides that an arrearage of three months in the payment of dues causes a member to "automatically forfeit all rights and good standing in the Local Union and in the URW." However, Article VI, §3, provides that Union members on layoff who have "recall rights" may obtain an exemption from their dues obligation. The exemption is renewable at ninety-day intervals.

Petitioners were laid off in 1981 by the American Synthetic Rubber Corporation due to a lack of work. The Petitioners paid no union dues after their layoff. Gordon Panter was the only Petitioner who requested and received a dues exemption. Panter never re-

quested an extension of this initial ninety (90) day exemption. Therefore, all of the Petitioners, except Panter, were removed from the membership rolls of the Unions after they had fallen three months behind in the payment of membership dues. Panter was removed from the Unions' membership rolls three months after his dues exemption expired.

Almost two years after all of the Petitioners had given up the rights and privileges of Union membership, the Unions and American Synthetic Rubber Company began negotiations for a new collective bargaining agreement. Negotiations began on January 6, 1984. On December 29, 1983, the Company had informally advised the Unions that its major objective in the negotiations was to terminate the recall rights of laid off employees. Even at that early point, the Company had determined that it was prepared to face a strike, if necessary, in order to obtain a termination of the laid off employees' recall rights. Under the 1981 collective bargaining agreement that expired on March 1, 1984, the Petitioners' right to be recalled from layoff was subject to no explicit temporal limitation.

The local Union immediately notified each Petitioner of the Company's bargaining position on the recall issue. It was not until after Local Union President Stringfield had met with all the Petitioners, that the Union and Company exchanged their first bargaining proposals with respect to the Petitioners' rights of recall. The Local Union went to great lengths to

keep the Petitioners advised throughout the bargaining process.

Even after the laid off employees relinquished their membership in the Unions, they were extended every courtesy by the Unions, except the right to vote on matters of Union business. They were allowed to attend and speak at Union meetings. However, none of the Petitioners were ever allowed to vote on any matter of official business brought before the membership at any Union meeting conducted after they relinquished their Union membership. Only one laid off employee, Dohoney, not a Petitioner in this action, testified that he had ever been permitted to vote at a Union meeting subsequent to receiving an Honorable Withdrawal and Transfer Certificate. However, Dohoney admitted that nobody had ever raised a question as to his eligibility to vote at any of the meetings. Nor was he able to testify that he ever had cast the deciding vote on any matter subject to a referendum of the membership.

The Unions *never* "prepared and agreed" upon any list of employees who were to lose recall rights and be denied a vote upon the ratification of a new agreement. The record is clear that these lists were prepared *by the Company.*

During negotiations, the Unions diligently sought to prevent the Company from limiting the Petitioners' right of recall from layoff. Donald Schmidt, the Company's Director of Manufacturing, testified before the district court that the Unions' were vocal throughout the negotiations in their efforts to preserve the Peti-

tioners' recall rights. The Unions proposed compromises on other issues in an effort to persuade the Company to modify its position with respect to the question of recall. These Union proposals included offers to relinquish other rights previously granted by the Company. But not even these efforts were successful. The Company rejected the Union's offers of compromise. Not even the assistance of a federal mediator was sufficient to cause the Company to alter its position. The mediator advised the Unions that the Company would never change its position with respect to the issue of recall.

After weeks of hard bargaining, the Company, not the Unions, first proposed treating the recall rights of laid-off workers differently from the recall rights held by employees who were then actively employed. The Company's "last, final and best offer," dated March 1, 1984, proposed the termination of the rights of recall held by employees who were laid off at that time.

At the time they were laid off, the Company gave the Petitioners and other similarly situated employees the option of terminating their employment and receiving severance pay, or declining severance pay and awaiting recall to employment. Of the approximately 150 employees who were laid off, only the Petitioners declined the Company's offer of severance pay. The Company asserted that if its "last, final and best offer" were ratified by the Unions' membership, the Petitioners' eligibility to receive severance pay upon resignation would terminate. The Petitioners would no longer

be laid off employees; they would be former employees. After consultation with the Unions' legal staff, the Unions proposed that the Petitioners' eligibility for a severance award be extended for a period of thirty days following any ratification of the Company's "last, final and best" proposal. However, the Company was willing to extend the Petitioners' eligibility for only a period of 48 hours.

The Unions' bargaining committee submitted the Company's "last final and best" proposal to a ratification vote of the Unions' membership on March 7, 1984. The bargaining committee did not recommend either acceptance or rejection of the Company's proposal. The Company's proposal was approved by the Unions' membership by a vote of 79 to 7. Even if the Petitioners had cast votes against ratification of the 1984 agreement, the contract would have been approved by over 81% of the Union members who voted. A simple majority was sufficient to ratify the agreement.

The Petitioners were not permitted to speak or vote at the March 7, 1984, ratification meeting. Local Union President Stringfield had explained to the Petitioners in January, 1984, that they would not be permitted to vote on the ratification of a new contract under the provisions of the Unions' constitution. Stringfield forbade the Petitioners from speaking at the March 7, 1984, meeting because he "didn't want an ugly situation to develop." The Union's membership had been "in a boisterous mood, uncontrolling, uncontrollable," in a meeting conducted on March 1, 1984, at which the

Petitioners were allowed to speak. Stringfield felt that "the possibility that a conflict between the regular members and these members [the Petitioners] on the issue of striking was a highly emotional issue, and I felt it could get out of control." The Petitioners had been given an opportunity to voice their opinions at all previous Union meetings.

REASONS FOR DENYING THE WRIT

ARGUMENT

a. Summary

No important questions of federal law are presented by the Petition. The circuit courts of appeal are in agreement in holding that the claims asserted by the Petitioners merit no relief.

Petitioners have no enforceable rights under the provisions of 29 U.S.C. §§411 or 412 because they are not "members" of the Unions, within the meaning of 29 U.S.C. §402(o). The Unions did not unfairly represent the Petitioners' interests in their efforts to cope with the Company's hard bargaining position on the subject of recall rights. The Union's compliance with the will of the majority of the bargaining unit was not arbitrary, discriminatory, or in bad faith. The Unions did not deprive the Petitioners of severance pay. Petitioners alleged entitlement to severance pay benefits is not vested under the provisions of ERISA.

b. The Petitioners Were Not Entitled to Participate In The Ratification Of The Unions' 1984 Contract With The Company.

Petitioners have presented no valid claim under the provisions of 29 U.S.C. §412 for vindication of rights secured by the provisions of 29 U.S.C. §411. "[If] an individual has failed to comply with the membership requirements of a labor organization, that individual may not obtain relief under the Act." *Brennan* v. *Local 357, International Brotherhood of Teamsters,* 709 F. 2d 611, 614 (9th Cir. 1983). "Non-union employees have no voice in the affairs of the Union." *NLRB* v. *Financial Institution Employees of America,* 475 U.S. 192, 205 (1986); *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 191 (1967). Here, the Petitioners have not stated a valid claim under the provisions of 29 U.S.C. §412 because they had not fulfilled their dues obligation, nor obtained an exemption from that obligation, and were not "members" of the Unions on March 7, 1984, when they were forbidden from speaking and voting on the Company's "last, final and best" contract proposal.

"It is well settled that a union's consistent interpretation of its own constitution will not be disturbed by a federal court unless the challenged regulation is 'unreasonable.'" *Taylor* v. *Great Lakes Seaman's Union,* 701 F. 2d 590, 592 (6th Cir. 1983); *see, International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971). Here, the constitution binding the Unions and the Petitioners, as members of the Unions, required the Petitioners to make monthly dues payments

in order to maintain their membership. Unless the Petitioners obtained a dues exemption, then either issuance of an Honorable Withdrawal and Transfer Certificate, or an arrearage of three months in the payment of dues, automatically resulted in the termination of their membership rights. Under these circumstances, the federal appellate courts agree that the Petitioners had no rights under 29 U.S.C. §412. *Taylor* v. *Great Lakes Seaman's Union,* 701 F. 2d 590 (6th Cir. 1983); *Brennan* v. *Local 357, International Brotherhood of Teamsters,* 709 F. 2d 611 (9th Cir. 1983); *Williams* v. *International Typographical Union,* 423 F. 2d 1295 (10th Cir. 1970).

The import of these cases is made all the more apparent by comparing them with the decisions upon which the Petitioners place primary reliance.

In *Alvey* v. *General Electric Company,* 622 F. 2d 1279 (7th Cir. 1980), a union forbade laid off employees from voting upon a proposal to modify seniority rules which would have directly affected their priority for recall. The laid off union members were prevented from voting because the union's constitution provided that "only members in good standing may participate in union affairs" and members could maintain their good standing only by making timely dues payments. Under the provisions of that union constitution, "not only were laid off members not required to pay dues, but *they were prohibited from making a voluntary payment of dues in order to maintain their good standing.*" *Id.* at 1283 (emphasis added). Under that constitutional provision, "members on layoff are barred

from participating in all union matters regardless of their willingness to pay dues. . . ." *Id.* at 1285.

Alvey is distinguishable from the circumstances existing in this case. In *Alvey,* the union members' ineligibility to vote was thrust upon them, regardless of their willingness to satisfy their dues obligation. Here, the Petitioners were ineligible to vote upon the Company's "last, final and best" contract proposal because the Petitioners *chose* not to tender dues payments to the Unions,[1] and *chose* not to avail themselves of the dues exemption available under the provisions of the constitution. The Petitioners here, like the complaining union members in *Taylor, Brennan,* and *Williams,* had options available to them which would have insured their right to participate in the voting. In choosing not to avail themselves of those options, the Petitioners voluntarily withdrew from membership in the Unions and relinquished their rights under 29 U.S.C. §411. *See,* 29 U.S.C. §402(o).

Local Union President Stringfield testified that he advised the laid off employees of their right to make a written request for a dues exemption. The official minutes of the Unions' meeting of December 4, 1980, indicate that the dues exemption provisions of the constitution were explained to the Unions' membership at that meeting. However, even if the dues exemption provisions of the constitution had never been explicitly

[1]29 CFR §§452.86 and 452.92 may have preserved the Petitioners' rights of membership, if they had chosen to tender the necessary dues payments. Petitioners did not comply with these regulations.

pointed out to the Petitioners, the Petitioners would still be bound by the provisions of the Constitution.

In *Baldini* v. *Local Union No. 1095, UAW*, 581 F. 2d 145 (7th Cir. 1978), *overruled on other grounds, Rupe* v. *Spector Freight Systems,* 679 F. 2d 685 (7th Cir. 1982), and *Newgent* v. *Modine Manufacturing Company,* 495 F. 2d 949 (7th Cir. 1974), *overruled on other grounds, Rupe* v. *Spector Freight Systems, supra,* discharged employees brought suit against their unions alleging a breach of the unions' duty of fair representation.[2] The Petitioners attempted to explain their failure to exhaust available intra-union remedies by asserting that (1) they were unaware that the intra-union remedies were available and (2) union officials had misled them with respect to the availability of such remedies. In *Newgent,* the president of the union had advised Newgent that "further intra-union steps would be senseless and fruitless." 495 F. 2d at 922. In *Baldini,* a union official had advised Baldini that "nothing more could be done for him" after the union failed to meet a contractual deadline for the submission of Baldini's dispute to arbitration. 581 F. 2d at 148.

In both *Baldini* and *Newgent,* it was held that a union member assumes the responsibility of becoming aware of the obligations imposed upon him under the terms of his union's constitution and bylaws. A union

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[2]*Rupe* overruled *Baldini* and *Newgent* in order to comply with *Clayton* v. *UAW,* 451 U.S. 679 (1981). 679 F. 2d at 690-691. *Baldini* and *Newgent* still support the general principal that a union member is bound to comply with the requirements of his union's constitution.

member is not entitled to rely upon misstatements of union officials as an excuse for his ignorance of the relevant provisions of his union's constitution. Union constitutions are public records, freely available from the United States Secretary of Labor. *See,* 29 U.S.C. §§431(a) and 435. This fact, together with a union member's obligation to thoroughly familiarize himself with the provisions of the union's constitution, render alleged misstatements of union officials immaterial. 581 F. 2d at 148; 495 F. 2d at 927-928.

Gray v. *International Association of Heat and Frost Insulators and Asbestos Workers,* 447 F. 2d 1118 (6th Cir. 1971) is consistent with the *Baldini* and *Newgent* decisions. There, it was held that the acceptance of an application for union membership, when considered together with the provisions of the union's constitution and bylaws, constitutes a written contract binding the union and its members. "By becoming a member of a union, the worker, in effect, makes a contract that he is to be governed by the constitution and by-laws of the organization." *Cleveland Orchestra Committee* v. *Cleveland Federation of Musicians,* 303 F. 2d 229, 230 (6th Cir. 1962). Therefore, the Petitioners in this case were contractually bound to adhere to the provisions of the Unions' Constitution.

Had the Petitioners in this case adhered to the provisions of the Unions' Constitution, the Petitioners would now have no claim against the Unions. Clearly, it is their own failure to apply for and maintain a dues exemption that is the source of their present plight.

Christopher v. *Safeway Stores, Inc.*, 103 LRRM 2018 (E.D. Tex. 1979), cited by the Petitioners, held that a local union violated its own constitution, and 29 U.S.C. §411, by negotiating a new collective bargaining agreement which changed the manner in which its members' seniority credit was computed, without notifying the affected members of the negotiated change or allowing those members to vote upon its ratification. Here, the Unions hid nothing from the Petitioners. Nor did the Unions violate their constitution. Rather, the Unions advised the Petitioners, months in advance of the contract ratification, of the company's assault upon the Petitioners' recall rights and that the Unions' constitution did not entitle the Petitioners to voting rights with respect to the new agreement. The Petitioners sought no intra-union appeal from the ruling regarding their right to vote. *Christopher* is distinguishable on this basis.

c. The Petitioners' Recall Rights Were Subject To Modification Through Collective Bargaining.

The Petitioners argue that their recall rights were "status benefits" which the Unions and Company intended to irrevocably vest in the Petitioners in the manner described in *United Auto Workers* v. *Yard-Man, Inc.*, 716 F. 2d 1476 (6th Cir. 1983). Petitioners cite no decision extending the *Yard-Man* rule to contractual rights unrelated to pension benefits. Public policies reflected in ERISA demonstrate that pension benefits are entitled to special protection. However, those policies do not necessarily afford similar protec-

tion to all negotiated benefits. *See, e.g., White Farm Equipment Co.* v. *White Motor Corp.*, 788 F. 2d 1186 (6th Cir. 1986).

If the *Yard-Man* rule were extended to all contractual benefits negotiated by an employer and union, the parties to a collective bargaining agreement would never be able to modify the provisions of their agreement as changing conditions require. Contractual rights created in one agreement would become permanently vested in the employees covered by that agreement, depriving the contracting parties of their discretion to modify those contractual rights in future agreements. Extension of the *Yard-Man* rule to benefits unrelated to pensions threatens the concept of *collective* bargaining. Individual members of the bargaining unit would enjoy different, irrevocable employment benefits, established over the course of their respective employments, in dozens of different and conflicting labor agreements.

Further, the collective bargaining agreements executed by the Unions and Company in this case do not indicate that it was a parties' intention to make the Petitioners' recall rights irrevocable. Article XXIV of the 1981 agreement provided that all provisions of the agreement were subject to modification through negotiation. Although the record does not support the Petitioners' assertion that their allegedly unlimited recall rights were incorporated into every bargaining agreement executed since 1959, if we assume this contention to be true, it would be apparent from the repeated negotiation of such a contract provision that the

parties never intended the recall rights originally negotiated in 1959 to be irrevocable. Why else would they have bothered to include a recall provision in every bargaining agreement negotiated since 1959?

An employee's seniority rights arise exclusively from the labor-management agreement. These rights are not vested. "The incidents of seniority can be freely altered or amended by modification of the collective bargaining agreement." *Charland* v. *Norge Division, Borg-Warner Corporation,* 407 F. 2d 1063, 1064 (6th Cir. 1969); *Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F. 2d 29, 33 (2nd Cir. 1968).

d. The Unions Did Not Breach Their Duty Of Fair Representation.

Although the Petitioners allege federal jurisdiction under 29 U.S.C. §185(a) and claim that the Unions breached their duty of fair representation, Petitioners have neither alleged nor proven any "violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . .," the jurisdictional fact upon which suits under §185(a) must be based. Rather, the Petitioners complain of the Unions' negotiation, execution and *compliance* with such a contract. Obviously, 29 U.S.C. §185(a) cannot be the source of the Petitioners' "fair representation" claim, nor the jurisdictional basis of this action. *Adams* v. *Budd Company,* 349 F. 2d 368 (3rd Cir. 1965); *Leskiw* v. *IBEW,* 464 F. 2d 721 (3rd Cir. 1972), *cert. den.,* 409 U.S. 1041 (1972).

The true essence of the Petitioners "fair representation" claim is merely their dissatisfaction with the actions taken by a majority of the collective bargaining unit in ratifying a new contract with the Company. Their dissatisfaction is not sufficient to support this lawsuit. *Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953); *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Shamblin* v. *General Motors Corporation,* 743 F. 2d 436 (6th Cir. 1984).

> . . . [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Humphrey v. *Moore, supra* at 349-350.

Here, the Unions were faced with only two options: accept the Company's last, final and best offer or strike. The Unions' negotiating committee turned the decision over to the membership without a recommendation. The membership decided, by a vote of 79 to 7, not to strike.

Petitioners argue that the Unions' bargaining committee breached a duty owed to the Petitioners by failing to persuade an unwilling majority of the Unions' membership to reject the employer's "last, final and best offer" and initiate a strike. Petitioners claim

that their right to be recalled from layoff would have been preserved by this course of action. This claim is false. After several months of hard bargaining, the Company's clearly-stated bargaining position remained unchanged: The recall rights of laid off employees must be terminated, regardless of the Unions' threat to strike. Under these circumstances, it is quite likely that rejection of the employer's "last, final and best" contract proposal, and the initiation of an economic strike, would have resulted in nothing other than a bargaining impasse on the recall issue. Such an impasse would have authorized the employer to implement its "last, final and best" offer regardless of the Unions' opposition. *NLRB* v. *Katz,* 369 U.S. 736 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.,* 337 U.S. 217 (1949). Because no option available to the Unions could have insured the preservation of the Petitioners' recall rights upon the expiration of the 1981 bargaining agreement, there was no justification for the Petitioners' insistence on a strike that was disfavored by the vast majority of the Unions' membership.

e. The Petitioners' Rights To Severance Pare Are Not Protected From Modification by ERISA.

The Unions did not interfere with the Petitioners' attainment of severance pay due them under the 1981 collective bargaining agreement. Rather, the Unions negotiated an *extension* of those rights beyond the termination date of the 1981 agreement. The Unions

enhanced, rather than hindered, the Petitioners' opportunity to receive severance pay.

Moreover, the Petitioners had no vested rights in the severance pay benefits made available under the 1981 agreement. The "vesting" provisions of ERISA do not apply to "an employee welfare benefit plan," as defined in 29 U.S.C. §1002(1). 29 U.S.C. §1051(1); *White Farm Equipment Company* v. *White Motor Corporation,* 788 F. 2d 1186, 1191-1193 (6th Cir. 1986). Because the Petitioners' severance pay benefits were, if anything, a "welfare benefit," those benefits were subject to modification through collective bargaining. 29 U.S.C. §1140 protects only vested rights, not a "welfare benefit" such as severance pay. *See, Sutton* v. *Weirton Steel,* 724 F. 2d 406, 410-411 (4th Cir. 1983); *West* v. *Butler,* 621 F. 2d 240, 245 (6th Cir. 1980).

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293 L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—Entered Dec. 17, 1984

Gordon Panter and nine (9) other former employees of American Synthetic Rubber Corporation, hereinafter ASRC, bring this action against ASRC and the United Rubber, Cork, Linoleum and Plastic Workers of America, International Union, hereinafter URW International Union, and its affiliate, Local 423, hereinafter Local 423. Panter and the other plaintiffs are former union members. Plaintiffs allege jurisdiction under 29 U.S.C. §185, the Labor Management Relations Act (LMRA), 29 U.S.C. §401 *et seq.*, the Labor Management Reporting and Disclosure Act; (LMRDA), and, in their amended complaint, under KRS 344, the Kentucky Civil Rights Act, by pendent jurisdiction.

The case is before the Court on plaintiffs' motion for injunctive relief requiring ASRC to reinstate them to their former positions, and on the defendants' motions for summary judgment. We will resolve these issues in order.

In March of 1981, ASRC and Local 423 entered into a collective bargaining agreement which provided that all employees with two or more years of seniority had unlimited recall rights upon layoff. The agreement expired on March 1, 1984, at which time ASRC and Local 423 negotiated a new collective bargaining agreement. The new agreement terminated the recall rights of all employees who had been on layoff for more than two years, and provided severance pay for all laid-off employees who agreed to waive any claim to further employment. The plaintiffs were among those affected by this agreement, because they were on layoff at that time and, for the most part, had been on layoff since the summer of 1981. Almost all the plaintiffs are over forty years of age.

After negotiating the new contract, the union leadership submitted the proposed agreement to a ratification vote by the union membership. The union leadership refused the plaintiffs both the right to speak at the meeting, as well as the right to vote on the proposed agreement. The union membership ratified the proposed contract by a sufficient margin, so that the plaintiffs' votes would not have changed the result. Subsequently, the plaintiffs filed this action, alleging a breach of contract against ASRC, a breach of the duty of fair representation, and a violation of the union members' "bill of rights" against Local 423 and the International Union, and age discrimination against both the union and the employer.

Mr. Max Stringfield, Local 423 President, informed the plaintiffs that they "probably" would not be allowed to vote on the proposed contract, subject to the decision of the International Union, which later concurred in his decision. Under the union Constitution, members on layoff are required to obtain a Dues Exemption Certificate in order to preserve their membership rights while on layoff. URW Constitution, Article VI, Section 3(a)(1) and 3(B).

If a union member is laid off and fails to request a Dues Exemption Certificate, the URW Constitution directs that the union issue that member a Honorary Withdrawal and Transfer Certificate, Article VII, Section 5(a)(4), which "forfeit[s] that member's rights in the local union and the [International]." Article VII, Section 5(d).

The Constitution limits a member's right to a dues exemption of twelve months, after which the union must issue the member an Honorary Withdrawal and Transfer Certificate, but the member may request an extension from both the local and the International Union. Article VI, Section 3(d). The union contends that the plaintiffs failed to take advantage of the dues exemption, and that they have no legitimate complaint concerning the union's refusal to allow them the right to vote on the proposal or to speak at the meeting. *See generally,* Tr. Vol. II at 27-32.

The plaintiffs presented testimony that they were unaware of the Dues Exemption Certificate requirement, or that Mr. Stringfield told them that the cards "were automatically issued." Tr. Vol. 1 at 48, 49, 72, 81, 86, 94-95, 99, 173-74, 187; Vol. II at 191-92. However, the plaintiffs admitted that they did not vote on any issues while they were on layoff. Tr. Vol. I at 59, 75, 83-84, 97-98, 189, and Tr. Vol. II at 62, although one witness for the plaintiffs, Mr. Dohony, testified that he voted and spoke at meetings while on layoff. Tr. Vol. II at 112-15.

The evidence does indicate that the union represented various plaintiffs on several grievances and at disability hearings during the time that they were on layoff and should have possessed a Dues Exemption Card or an Honorable Withdrawal and Transfer Card. Tr. Vol. I at 142, 144, 188; Vol. II at 38-39. The evidence also indicates some confusion by the plaintiffs over the precise function of the two cards. *E.g.,* Tr. Vol. I at 77-78, 98-99; Vol. II at 3-4. However, the evidence also indicates that the union did

explain the distinction during the December 1980 meeting, although Mr. Dohony, the individual who was listed in the official minutes as having made the representation, testified that he did not know the difference himself. Tr. Vol. II at 3-4.

We also note that the union took a vote to authorize the union leadership to call a strike. The union leadership allowed Mr. Panter to speak at the meeting but did not allow the plaintiffs to vote. Mr. Stringfield testified that the plaintiffs did not request the right to vote at that meeting, and that they did not contest is decision not to allow them to vote. Tr. Vol. II at 65-66. Mr. Stringfield did testify that these members on layoff were allowed to speak at most union meetings as a "courtesy." Tr. Vol. I at 102-03, 114. He testified that he did not allow the plaintiffs to speak at the ratification meeting because he "didn't want an ugly situation to develop. They weren't allowed to vote anyway," and because he "felt that the possibility that a conflict between the regular members and those members on the issue of striking was a highly emotional issue, and I just felt it could get out of control." Tr. Vol. I at 116, *See also,* Tr. Vol. I at 134-36.

The plaintiffs claim that the union did not represent them adequately in the negotiation process. Essentially, the plaintiffs allege that the union did not bargain "tough enough" with the company during the negotiating process, *e.g.,* Tr. Vol. I at 92, and that there was a "conspiracy" between the union and the company which led to the termination of the plaintiffs' seniority rights. The plaintiffs argue that the union should have called a strike to support the contract demands because the membership had authorized a strike at a previous meeting.

The plaintiffs also introduced evidence of two "suspicious" meetings between union officials and company officials. The first meeting occurred on December 29, 1983,

at the Fifth Quarter Restaurant in Louisville, Mr. Stringfield and Mr. Yarbrough, a representative of the International, represented the union, while Mr. Schmidt and Mr. Wall represented the company. The parties testified that the ASRC used this meeting to inform the union that it would seek termination of the plaintiffs' recall rights. Tr. Vol. I at 117-18; Vol. II at 57-58. The evidence indicates that the union officials promptly informed the members of the plaintiff class about the company's forthcoming proposal.

Mr. Leo Vincent testified that he saw Mr. Stringfield and Mr. Wall, an ASRC official, at the Fifth Quarter at some unspecified earlier time in the fall, presumably on October 8, 1983, the Stringfield's anniversary. However, the record is not clear whether Mr. Vincent alleged that Mr. Stringfield and Mr. Wall sat together or separately, and we have no other reference in the record to this alleged incident, which would have occurred some three months prior to the beginning of negotiations. *See* Tr. Vol. I at 174-75; Vol. II at 56-57.

ASRC proposed that employees would lose recall rights after one (1) year, whether or not they were currently on layoff. Tr. Vol. I at 104. Subsequently, ASRC modified its proposal to apply only to those employees who were then on layoff. Tr. Vol. I at 104-05. The union responded with a counteroffer, which would have given those persons on layoff recall rights for two years or a time equal to their seniori;y, whichever was shorter, from the date of the agreement, as well as a complete probationary period. Moreover, this clause would not apply to persons employed as of the date of the agreement. Tr. Vol. I at 105-07.

ASRC responded with a "last, best, and final" offer (on the same day the old contract expired) which provided that all employees who had been on layoff for more than two (2) years would lose their recall rights, but that the provision

would not apply to those persons who were then employed or who were receiving accident and sickness benefits. Vol. I at 108. *See also,* Tr. Vol. II at 44-47, 67-70. The union attempted to obtain a one-month period for those persons who were losing their recall rights to obtain their severance pay. ASRC refused and the parties eventually settled on 48 hours. Understandably, the plaintiffs argue that this provision placed a certain amount of compulsion upon them to accept the severance pay and renounce any claim to future employment.

Mr. Stringfield testified that he kept Mr. Panter, the acknowledged leader of the plaintiffs' group, fully informed of the progress of the negotiations, and that he gave him a list of laid-off employees and their telephone numbers so that he could set up a committee of those people who would be affected by this proposal. Mr. Panter does not dispute this testimony.

Mr. Stringfield and the other union leaders presented the proposed agreement to the union membership without any recommendation whether to accept or reject the proposal. Tr. Vol. I at 110. The membership accepted the proposal by a vote of 79-7. Tr. Vol. II at 71. The membership had authorized the union leadership to call a strike by the vote of 98-3. However, Mr. Stringfield testified that the union membership was opposed to a strike, and the strike vote was taken as a negotiating tactic. Tr. Vol. II at 92-3, 103-05. Mr. Stringfield testified that under normal procedure, if "the final offer of the tentative agreement is turned down, then the strike is called." Tr. Vol. II at 92. In essence, if the membership had rejected the tentative agreement, i.e., ASRC's "last, best, and final" offer, the local leadership would have sought permission from the International Union to call a strike. According to Mr. Stringfield, the Local could not call a strike without permission

from the International, even after taking a strike vote. Tr. Vol. II at 100-01.

The plaintiffs also attack the Local's acceptance of an ASRC proposal in late 1983 which allowed employees the right to choose between possible retirement plans. Apparently, ASRC was concerned that certain employees would retire before the beginning of the new contract. Thus, ASRC offered the employees the chance to choose to retire under the provisions of the old contract (pre-March 1, 1984) or under the new contract (post-March 1, 1984). ASRC officials testified that the company was afraid of losing valuable employees just when it was beginning to rebuild its business. Thus, ASRC improved its pension plan offer under the new contract and allowed employees the options of retiring under either contract. Tr. Vol. I at 156-59. *See also,* Vol. II at 51-54, 66-67.

ASRC official Don Schmidt also testified that the reason that the company pushed the recall clause so hard was that the company was unwilling to rehire some 35 of the approximately 50 workers on layoff, although he did not identify any of the plaintiffs as belonging to that category. Tr. Vol. I at 151-54. Mr. Schmidt admitted that the workers had nothing adverse in their disciplinary records, but that it was possible for a person to be a poor worker and still not have any disciplinary record. Mr. Schmidt stated that the company felt very strongly about the clause and was willing to accept a strike in order to obtain the desired clause. Tr. Vol. I at 166.

Mr. Stringfield also testified to the company's adamant position and to the hard bargaining that went on between the parties. He agreed that he believed that the company would accept a strike. He also testified that he arranged for the intervention of a Federal Mediator, and that the Mediator advised him that the company appeared likely

to accept a strike if it did not achieve its goal of cutting off the plaintiff's recall rights. Tr. Vol. II at 67-72.

With respect to the plaintiffs' motion for injunction, we believe that the Sixth Circuit Court of Appeals' decision in *Aluminum Workers International* v. *Consolidated Aluminum Corporation,* 696 F. 2d 437, 442-44 (1982) is dispositive. In that case, the parties had entered into a collective bargaining agreement which contained a broad grievance and arbitration provision. The corporation-appellant notified the appellee union that it intended to restructure certain job classifications with the ultimate effect of eliminating 16 employees. The union objected and asserted that the company did not have the right to make the reclassifications. When the company implemented its plan, the union filed suit and the District Court ordered the company to reinstate the 16 laid-off employees, and to return to the *status quo ante* pending arbitration.

On appeal the Appellate Court held that the union could not prove that it would suffer irreparable harm. The Court, in essence, held that loss of employment, which is the result of job eliminations by a solvent employer, will not support a claim by the union for injunctive relief, if the employer is solvent and has the ability to reinstate its employees or pay the wages for the period of unemployment. Judge Martin, speaking for the Court, held that although the union could point to repossessions, foreclosures, and injury to credit status which might befall the 16 jobless employees, these potential damages were speculative, and would materialize only in select cases, and only when the parties were unable or unwilling to commence arbitration. *Id.,* at 444.

Judge Martin also referred to the availability of unemployment relief, health insurance, and financial support from the union, and to the fact that the award of back pay could be used to repair any damage to credit or to re-

purchase goods repossessed by creditors during the arbitration. *Id.*, at 444. While the Sixth Circuit opinion heavily emphasized the various effects that the injunction would have on the arbitration process, the Court, for a third time on page 445, stated that the critical issue was whether the injuries complained of could not be adequately redressed by an arbitrator's award.

In the instant case, we do not have an arbitrator's award but we do have a complaint for damages. While we perceive no threat to the arbitration process here, since none is involved, we believe that the potential right to damages is to be considered in the same light as is the potential right to back pay where arbitration is concerned.

Even if the element of irreparable injury were present, we do not believe that plaintiffs have met all of the four tests which must be addressed before a preliminary injunction is issued. They are set out in *Mason County Medical Association* v. *Knebel*, 563 F. 2d 256 (6th Cir. 1977) and are as follows:

> 1. Whether the plaintiffs have shown a strong or substantial likelihood ir probability of success on the merits;
>
> 2. Whether the plaintiffs have shown irreparable injury;
>
> 3. Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4. Whether the public interest would be served by issuing a preliminary injunction.

In the case at bar, for reasons which will be more fully discussed in the opinion, we do not believe that plaintiff has shown a probability of success on the merits. We, therefore, overrule plaintiffs' motion for an injunction ordering the ASRC to recall plaintiffs.

Plaintiffs allege that their rights under the Landrum-Griffin Act were violated by the union. *See* 29 U.S.C. §411 *et seq.* The plaintiffs rely heavily upon *Alvey* v. *General Electric Company,* 622 F. 2d 1279 (7th Cir. 1980). In that case, the union's constitution required members in good standing to pay dues but prevented members on layoff from making dues payments. Therefore, those persons on layoff had no chance to either speak or vote at a union meeting, during the course of which the union membership adopted a contract proposal which affected their recall rights.

The *Alvey* Court held that the union had violated 29 U.S.C. §411(a)(1) by barring the members "from participating in *all* union matters regardless of their willingness to pay dues or the extent to which the union matters may compromise, or as here, extinguish, their rights." *Id.* at 1285. The *Alvey* Court also stated that a member on layoff remained "a member in substance" until he withdrew or was "expelled or suspended after appropriate proceedings," *Id.* at 1284; *See also,* 29 U.S.C. §402(o). Other courts, however, have held that a union may limit voting to members in "good standing" or limit voting to those whose interests are directly affected by the issue." *See American Postal Workers Local 685* v. *American Postal Workers Union,* 665 F. 2d 1096, 1103 (D.C. Cir. 1981) and *Taylor* v. *Great Lakes Seaman's Union, Local 5000,* 701 F. 2d 590, 591-92 (6th Cir. 1983).

The primary concern in *Alvey* was that the union constitution prevented members on layoff from exercising their rights while on layoff. In the instant case, the union Constitution allowed members to obtain a Dues Exemption Card which would allow them to continue to participate in union meetings as members. In fact, the evidence shows that Panter himself and another plaintiff, Mr. Foster, did obtain these cards for one year, but that they did not attempt to renew them.

As the *Alvey* Court points out, when considering a challenge to a union's rules concerning a member's good standing, this Court must consider a balance between the " 'anti-democratic effects' of the rule and the [union] interests urged in its support'." 622 F. 2d at 1283 (citing *United Steelworkers* v. *Usery*, 429 U.S. 305, 310 (1977).

In this case, the union has a legitimate interest in making sure that the union's decisions are made by those who are actively involved in the union's activities. The union has a legitimate interest in requiring that those persons who are interested in working with the union and availing themselves of union benefits demonstrate that interest by becoming sufficiently involved in the union that they maintain some specific official tie to the union, i.e., by maintaining a Dues Exemption Card, which, as we noted above, is renewable.

In this case, the plaintiffs could easily request a Dues Exemption Card. In fact, two plaintiffs performed that function. The union Constitution also provided a mechanism which allowed the plaintiffs to request an extension of the Dues Exemption Card after its expiration. Although none of the plaintiffs even attempted to apply for this extension, the plaintiffs allege that the union officials misled them into thinking that the dues exemption was automatic. We also note evidence that the union officials did explain members' duties at regular union meetings. Furthermore, the Constitution specifically spells out each member's duties with regard to payment of dues. While several plaintiffs testified that they did not possess a copy of the Constitution, we note that a union member has a duty to become familiar with his rights and duties as a union member and as a member of the bargaining unit. *E.g.*, *Baldini* v. *Local 1095*, 581 F. 2d 145, 148-49 (7th Cir. 1978); *Newgent* v. *Modine Manufacturing Company*, 495 F. 2d 919, 928 (7th Cir. 1974).

The plaintiffs also attempt to show that the union is estopped from denying them speaking and voting rights because of the union's course of conduct or practice of allowing the members on layoff to speak at prior meetings and allowing some of them to vote at some meetings. Again, we do not find any clear course of action. The plaintiffs' testimony, with the exception of Mr. Dohoney, agreed that they were not allowed to vote at union meetings.

The union's denial of the right to speak causes this Court some serious concern. The union had established a "practice and pattern" of allowing the members on layoff the chance to speak at most if not all meetings, including those where votes would take place. Mr. Stringfield based his decision not to allow the plaintiffs to speak upon both advice from International Union officials and on his fear of an "ugly situation."

In general, the plaintiffs complain that the union did not inform its members, either those active or those on layoff, of its meetings, rules, and regulations. The plaintiffs allege, for example, that union meetings were always held during the second shift, and that many of the plaintiffs worked the second shift and were unaware of the union's rules concerning the Dues Exemption Cards. Furthermore, the plaintiffs urge that there is no clear evidence supporting the union's claim that it informed the membership of all its activities. We agree that the union's conduct of its meetings leaves a great deal to be desired in the way of formalities and clarity in its record keeping. *See, e.g.*, Tr. Vol. II at 76-77, 99-100. We also believe that disputed issues of material fact remain; and therefore, the defendants' motion for summary judgment on the Landrum-Griffin claim is denied.

The plaintiffs' next allege a breach of the duty of fair representation. While the plaintiffs were not members of

the union in good standing, they were still members of the bargaining unit. In other words, the plaintiffs still had rights which flowed from the collective bargaining agreement, i.e., their recall rights. As long as they had those rights, the union was under a duty of fair representation to guard these rights. This case does not involve people who were no longer members of the bargaining unit as was the case in *Cooper* v. *General Motors Corporation*, 651 F. 2d 249, 250 (5th Cir. 1981).

However, the union has a very wide latitude in exercising that duty. As the Seventh Circuit has noted, the Supreme Court has established two separate standards for breach of the duty of fair representation. Initially, the Supreme Court allowed the union a "wide range of reasonableness" when negotiating contracts for the members which it represents. *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338 (1953.) Thus, as the *Alvey* Court noted, the union may lawfully "follow the dictates of the majority if they determined that the decision reflected a proper resolution of conflicting but legitimate interests." 622 F. 2d at 1289. On the other hand, the Seventh Circuit has noted that the Supreme Court defined a more specific and somewhat higher standard when dealing with employee grievances under the standard of *Vaca* v. *Sipes*, 386 U.S. 171 (1967). *See* 696 F. 2d 505, 514-15 (7th Cir. 1982). *See generally* Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35 (1979).

In this case, we confront a union's handling of a negotiation situation, which calls for the less severe "wide range of reasonableness" standard noted above. The plaintiffs argue that the union did not bargain "tough enough" in the words of Mr. Panter. Essentially, Mr. Panter and his colleagues assert that the union should have called a strike in order to protect their rights, and that the strike vote

indicated the union members' support for the plaintiffs' position. Mr. Stringfield testified that the vote was a negotiating tactic, and that the union members would not have supported a strike. He further stated that the union members could have indicated support for the plaintiffs by simply rejecting the contract. Finally, ASRC official Don Schmidt testified that the company would have taken a strike in order to get its desires.

Initially, we note that the issue of the breach of fair representation is a question of fact for a jury. *E.g., Cox* v. *C. H. Masland & Sons, Inc.,* 607 F. 2d 138, 142-43 (5th Cir. 1979); *Minnis* v. *International Auto Workers,* 531 F. 2d 850, 852-53 (8th Cir. 1975). The burden of proof is by a preponderance of the evidence, *Dill* v. *Greyhound Corporation,* 435 F. 2d 231, 237-38 (6th Cir. 1970), and this Court has jurisdiction over a breach of fair representation in negotiation claim under Section 301 of the LMRA, 29 U.S.C. §185. *Farmer* v. *ARA Services, Inc.,* 660 F. 2d 1096, 1106 (6th Cir. 1981).

We find summary judgment appropriate on this issue. Mr. Panter can only point to his generalized feelings that the union "should have bargained tougher" during negotiations or that the union should have called a strike. We find no authority for imposing a "duty to strike" on the union, and we find no factual allegation to support any claim that the union could have taken any step to preserve the plaintiff's recall rights other than a strike. While the Court may entertain some personal doubt as to the vigor with which the union presented its counter-proposals to the company, we have absolutely no doubt that the company had taken an adamant position on the question of recall rights and would have suffered a strike in order to preserve its position. Again, we find no evidence that the union could have taken any position which would have reached an agreement but still retained the plaintiff's recall rights. For example,

the plaintiffs have not offered any evidence that the union mmebership would have voted to strike if the union leadership had proposed a strike.

Furthermore, we note that the union must also represent the other members of the union. In effect, the union must balance the plaintiffs' rights along with the desires of the other members of the union. For example, the plaintiffs complain that the union accepted a company proposal in late 1983 which had the effect of allowing union members then employed to postpone retirement until after the adoption of the new contract. The new pension plan allowed the employees to retire under their choice of the better of the two agreements. This agreement effectively persuaded several older members not to retire until after the adoption of the new contract, which had eliminated the plaintiffs' recall rights. Thus, the company was able to replace the retired employees with new hires instead of recalling the plaintiffs with their established seniority.

We conclude that had the union refused to accept this plan, the current employees could have filed exactly the same type of action against the union for breach of the duty of fair representation as the plaintiffs have filed in this case. Simply put, we find a case of hard bargaining by the company which was able to exert its economic power against its employees. We find no law against "tough" bargaining, either by the company or by the union. As the Eighth Circuit recently noted, federal law requires bargaining, it does not require agreement. *Johnson* v. *Air Line Pilots,* 650 F. 2d 133, 137 n. 3 (8th Cir. 1981).

Very recently counsel for the defendant union called the Court's attention to the case of *Shamblin* v. *General Motors Corporation,* 743 F. 2d 436 (6th Cir. 1984). In that case, all of the plaintiffs were employees of General Motors and members of the UAW local union. All except one had been originally hired as unskilled production workers. Under

the General Motors-UAW contract, most General Motors workers acquire plant-wide seniority on a one-for-one basis. There was, however, a separate seniority list for skilled employees, and one-for-one skilled trades seniority was acquired only when an employee was actually working in a trade. Such seniority was issued for purposes of layoff and recall within the skilled trades classification.

Prior to the lawsuit, an unskilled employee who sought to enter the General Motors skilled trades program was required to work for four years before he acquired any seniority rights in the skilled trades classification. Thereafter, he would continue to work under supervision for four years, after which, having successfully completed the training program, he would be reclassified as a skilled trades journeyman and afforded four years of seniority within that skilled trades classification for his eight-year training period. In effect, such employees before December 13, 1976 received one-for-two seniority.

Effective December 13, 1976, General Motors and UAW, through collective bargaining, amended the seniority provisions. The amendment provided that participants in training for skilled trades would prospectively be afforded seniority on a one-for-one basis within the skilled trades classification. This provision was obviously advantageous to new unskilled workers, but was not retroactively applied to the plaintiffs who were in the skilled trades training program. The plaintiffs claimed that the UAW should have secured a seniority agreement which would have provided them retroactively with one-for-one seniority for their skilled trades training.

Circuit Judge Edwards, in his opinion for the Court affirming the district judge's grant of summary judgment to the defendants, cited language from both *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338-39 (1953) and *Humphrey* v. *Moore,* 375 U.S. 335, 349-50 (1964), which points out that

conflict between employees represented by the same union is a recurring fact, and that a wide range of reasonableness must be afforded to a statutory bargaining representative in arriving at a collective bargaining agreement. The cases further point out that the complete satisfaction of all members of the union in such circumstances is hardly to be expected. *Shamblin* v. *General Motors Corp., supra,* reinforces our conclusion that the defendants are entitled to summary judgment on the issue of fair representation.

Plaintiffs have also alleged age discrimination under Kentucky law, KRS 344.040 *et seq.* and seek injunctive relief in the form of reinstatement and also damages. We find nothing in the Kentucky Civil Rights Act that does away with the plaintiffs' burden of proving irreparable harm. While the plaintiffs cite *City of Los Angeles, Department of Water and Power* v. *Manhart,* 435 U.S. 702 (1978), we believe that the decisions of the Sixth Circuit Court of Appeals in *Aluminum Workers International* v. *Consolidated Aluminum Corporation, supra,* and *Equal Employment Opportunity Commission* v. *Anchor Hocking Corporation,* 666 F. 2d 1037 (6th Cir. 1982) are controlling. Therefore, we repeat our previous holding that plaintiffs are not entitled to injunctive reinstatement.

Plaintiffs complain that the impact of the collective bargaining agreement of 1984 is disproportionate upon plaintiffs who are 40 years of age and whose seniority is a result of their age. In *Farmer* v. *ARA Services, Inc.,* 660 F. 2d 1096 (6th Cir. 1981), the Court held that a union which participates in a negotiation of a collective bargaining agreement may be found liable to four of its members because the contract was discriminatory against the female members. *Id.,* at 1104 (citing cases).

Defendants move for summary judgment as to the age discrimination issue. Plaintiffs, in response, presented no discussion of their age discrimination claims. The tenor

of all the evidence presented at the preliminary injunction hearing also indicated that plaintiffs were relying on the issues of violation of the Landrum Griffin Act and the duty of fair representation, rather than upon any age discrimination claim. No evidence was presented by the plaintiffs as to whether or not plaintiffs are younger than the employees presently working in the defendants' plant, nor have they presented any evidence that new employees of the company, if there have been any since the institution of this suit, are younger than the plaintiffs.

The Sixth Circuit Court of Appeals in the case of *Rose* v. *National Cash Register Corporation,* 703 F. 2d 225 (1983) held that it had "declined to adopt rigid guidelines exclusively establishing a method for proving a *prima facie* case in age discrimination actions." *Id.* at 227. It did say that plaintiff has the burden of proving "he was discharged because of age," citing *Laugesen* v. *Anaconda Company,* 510 F. 2d 307 (6th Cir. 1975); or that age must be a determining factor, *see Blackwell* v. *Sun Electric Corp.,* 696 F. 2d 1176, 1180 (6th Cir. 1983); or that age makes a difference, *see Ackerman* v. *Diamond Shamrock,* 670 F. 2d 66, 70 (6th Cir. 1982); or that age is a contributing factor, *see Sahadi* v. *Reynolds Chemical,* 636 F. 2d 116, 117 (6th Cir. 1980).

Probably the case nearest in point to similarity of facts is that of *Massarsky* v. *General Motors Corp.,* 706 F. 2d 111 (3rd Cir.) *cert. denied,* __ U.S. __, 104 S. Ct. 348 (1983). There the plaintiff relied upon theories of both disparate treatment and disparate impact. The Court recited that in order to establish a *prima facie* case of disparate impact, plaintiff was compelled to show that the employer's selection process resulted in unfavorable treatment of a disparate number of members of the protected group to which the plaintiff belongs. *Id.* at 120.

In *Massarsky, supra,* the Court pointed out that under the General Motors' policies, General Motors students who were insulated from layoffs may generally have been younger than employees who were laid off in their place. The Court pointed out that even if all the laid off employees were older than the students who received special treatment, ADEA would not be violated, unless those who were aged 40 to 70 were disparately represented among the laid off employees.

In the instant case, plaintiffs have simply failed to present the Court with statistical proof as to the effect of the layoff policies contained in the collective bargaining agreement. The Court has been presented with no proof as to what the age computation is of those members of the union who had not been on recall for more than two years.

The *Massarsky, supra,* case refers to *Geller* v. *Markham,* 635 F. 2d 1027 (2nd Cir. 1980), *cert. denied,* 451 U.S. 945 (1981). In that case, there was a hiring policy that made over 90% of the protected age class ineligible for appointment to teaching positions. The policy also resulted in the exclusion of the majority of teachers over the age of 40. In *Geller, supra,* the Court held that the defendant could not assert as a viable defense the employment policy which was based in part on purely economic cost-cutting grounds in the face of tight budgetary constraints. The Court cited 29 C.F.R. §860.103(h) (1979), *Marshall* v. *Arlene Knitwear, Inc.,* 454 F. Supp. 715, 728 (E.D. N.Y. 1978), and *Laugeson* v. *Analconda Co., supra.*

In the case at bar, no evidence has been produced as to the reason for the decision of the company to insist upon the provision that no employee with more than two years layoff should be recalled. The lack of such evidence, however, is not harmful to the defendants, since the plaintiffs have failed to present the Court with any evidence that would meet their *prima facie* burden of showing an em-

ployment practice that is facially neutral in its treatment of different groups but, in fact, falls more harshly on one group than another and cannot be justified by business necessity. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977).

In light of the failure of the plaintiffs to present a *prima facie* case as to the age discrimination issue, the motion of the defendants for summary judgment will be granted. We have this day entered a judgment in accordance with these findings of fact, conclusions of law and memorandum opinion.

Dated 12-17-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293 L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - - *Defendants.*

JUDGMENT—Entered December 17, 1984

This action, having been heard by the Court without a jury on the plaintiffs' motion for a preliminary injunction, the evidence having been transcribed, and the Court, having entered its findings of fact, conclusions of law and memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs' motion for a preliminary injunction based upon alleged violation of the Landrum Griffin Act, the duty of fair representation, and KRS 344 *et seq.*, is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motion for summary judgment upon alleged violations of the duty of fair representation and KRS 344 *et seq.* is hereby granted.

IT IS FURTHER ORDERED that defendants' motion for summary judgment on plaintiffs' claim of Landrum Griffin Act violations is hereby denied.

This is not a final and appealable judgment, except as to that portion of the judgment which denies the plaintiffs' motion for a preliminary injunction which is appealable.

Dated 12-17-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORP., et al, - - - - - - - *Defendants.*

MEMORANDUM OPINION—Entered November 1, 1985

This action is submitted to the Court on the motion of the defendant American Synthetic Rubber Corp. (hereinafter "ASRC") for summary judgment, and on the motion of the plaintiffs to file a second amended complaint. For the reasons set out below, the motion for summary judgment will be granted, and the motion to file a second amended complaint will be denied.

It will be recalled that this action was heard upon the plaintiffs' motion for a preliminary injunction, and that the Court entered its findings of fact, conclusions of law and memorandum opinion denying a preliminary injunction based upon alleged violations of the Landrum-Griffin Act and of the duty of fair representation contained in 29 U.S.C. §301 and K.R.S. 344, and the Court further granted summary judgment to all defendants as to these claims. It was also ordered that the defendant's motion for summary judgment on plaintiff's claims of the Landrum-Griffin Act violations was denied.

Subsequently it has been pointed out to the Court by ASRC that the courts have consistently held that the Landrum-Griffin Act does not apply to employers but only to the relationship between the union and its members. *See Thompson* v. *New York Central Railroad,* 361 F. 2d 137 (2nd Cir. 1966), *Gross* v. *Kennedy,* 183 F. Supp. 750 (S.D. N.Y. 1960), and *Pack* v. *Associated Food Distributors of New England, Local No. 138,* 237 F. Supp. 113 (D.C. Mass. 1965). It therefore follows that defendant's motion for summary judgment as to the Landrum-Griffin Act claims of the plaintiff is meritorious.

Plaintiffs now have tendered a second amended complaint wherein they allege that the ASRC has violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.* No facts are alleged in support of this claim nor do the plaintiffs allege how the ERISA has been violated. It is apparent that if their claims of violation of ERISA are based upon their previous claims that they were wrongfully denied reemployment, they are barred from asserting such claims by virtue of the decision of the Court. Since the second amended complaint contains no allegations of fact as to how the plaintiffs' rights under ERISA were violated, the Court cannot determine what fact, if any, led to these claims. We therefore will deny the motion to file a second complaint with the proviso that plaintiffs may file a third amended complaint within thirty days of such complaint specifically alleges what provisions of ERISA were violated and in what manner. An order to this effect has been entered this day.

Dated 11-1-85

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORP., et al, - - - - - - - *Defendants.*

ORDER—Entered November 1, 1985

The defendant, American Synthetic Rubber Corp., having moved for summary judgment, and the Court having filed its memorandum opinion,

IT IS ORDERED that the motion for summary judgment be granted as to the claims asserted in the first amended complaint.

IT IS FURTHER ORDERED that the plaintiffs' motion to file a second amended complaint is denied, subject to the right of the plaintiffs to file within thirty days a third amended complaint which sets out the provisions of ERISA which allegedly have been violated by the defendant and the manner in which they were violated.

This is not a final and appealable order.

Dated 11-1-85

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION—Entered May 1, 1986

This action is pending before the Court on various motions. In order to understand these motions and the posture of the case, we will give a brief background of previous developments.

The original action was filed under the Labor Management Relations Act of 1947, as amended, Section 301(a) *et seq.*, Title 29 U.S.C. §185(a) *et seq.*, and the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) §101, 73 Stat. 519, *et seq.*, 39 U.S.C. §402 *et seq.;* and in addition under the Kentucky Age Discrimination Statute, K.R.S. Chapter 334 *et seq.*, by a group of laidoff workers against their ex-employer, American Synthetic Rubber Company (hereinafter ASRC), their local union and the union's international. The dispute grew out of a change in the company's labor management agreement which expired on March 1, 1984. Under that agreement, all laidoff employees with two or more years seniority had unlimited recall rights. However, under the new agreement ratified by the local union in March 1984, recall rights

for laidoff employees were to be terminated after two years of layoff. Plaintiffs in this case were all employees with more than two years seniority who had been laidoff for more than two years.

Under the union's constitution, laidoff employees could retain their union membership by either continuing to pay dues or asking for a dues exemption. If they failed to ask for a dues exemption, their union membership would be terminated after three months of nonpayment. Only two of the plaintiffs had asked for this extension, and in those cases, the exemption had expired before the meeting to ratify the new collective bargaining agreement was held by the union.

Plaintiffs claim they were allowed to speak at previous union meetings but were forbidden to speak or vote when the new agreement was approved by a vote of 79 to 7, which resulted in plaintiffs losing their recall rights.

On December 17, 1984 this Court denied plaintiffs' motion for a preliminary injunction, granted defendants' motion for summary judgment on the age discrimination claim and on the violation of the duty of fair representation but denied summary judgment on the Landrum-Griffin claim.

In 1985 the plaintiffs asked to file a second amended complaint dealing with an alleged violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.* Following that motion, the Court granted the ASRC judgment as to all claims asserted in the first amended complaint and denied plaintiffs' motion to file a second amended complaint but gave them permission to file a third amended complaint, which sets out specifically the provisions of ERISA which were allegedly violated.

Following the tendering of the third amended complaint, the Court entered an order which allowed the plaintiffs to file the third amended complaint on the issue of whether

or not the plaintiffs were wrongly denied their severance pay. Following that order on December 18, 1985, the plaintiffs attempted to reiterate in their third complaint every statement made in their past complaints, renew the ERISA claim because it improved benefits that they would have received under the new collective bargaining agreement, and alleged a denial of severance pay. Following the filing of the third amended complaint, the motions are now under submission.

We are of the opinion that the motions of ASRC for summary judgment should be sustained as to all claims filed by the plaintiffs, with the exception of the severance pay. All of the issues which are raised by the third amended complaint have already been ruled on in the Court's previous orders, and in the interest of judicial economy, the Court refers the parties to its previous opinions.

Also we note that the ASRC motion for a more definite statement should be sustained in order to ascertain whether plaintiffs' claims for severance pay have any relation to an alleged violation of ERISA.

With regard to the union's motion for summary judgment as to the Landrum-Griffin Act claims of the plaintiffs, it is apparent that there are disputes of fact as to whether or not the plaintiffs were given the right to speak at the union meeting which ratified the collective bargaining agreement. There is also a question of law, the answer to which is not clear, as to whether or not persons have who have been members of a union but who no longer are members retain their rights under the Landrum-Griffin Act. In light of this situation, the Court declines to grant the motion of the union for summary judgment.

An order to this effect has been entered this day.

Dated 01 May 1986

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - *Defendants.*

ORDER—Entered May 1, 1986

Various motions having been filed with the Court, and the Court being fully advised,

IT IS ORDERED that the motion of defendant, American Synthetic Rubber Corporation, to dismiss, except as to severance pay and the Landrum-Griffin claim of the plaintiff, is granted.

IT IS FURTHER ORDERED that the motion of the defendant, American Synthetic Rubber Corporation, for a more definite statement is granted.

IT IS FURTHER ORDERED that the motion of the defendant union for summary judgment be, and it hereby is, overruled.

This is not a final and appealable order.

Dated 01 May 86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION—Entered September 5, 1986

This case is submitted to the Court upon the motion of the defendant Unions, Local 423 and the International Union, for summary judgment, and the motion to dismiss filed by the Defendant, American Synthetic Rubber Corporation, hereinafter referred to as "ASRC," which the Court will treat as a motion for summary judgment. The Court will first discuss the motion of the corporation.

Plaintiffs' claim that ASRC violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* by arbitrarily denying their claim to severance pay. In March 1981, ASRC and Local 423 agreed to a three-year collective bargaining agreement. Under that agreement, laid-off employees with two or more years of seniority retained recall rights no matter how long they had been on layoff unless they requested and received severance pay in which case they lost all seniority and recall rights. Under the new collective bargaining agreement entered into in March 1984 between the Union and ASRC, all employees who had been laid-off for more than two years lost their

right to recall. Again, even if they were laid-off for less than two years, they lost their seniority and recall rights under the new agreement if they requested and received severance pay.

The Union, in its negotiations with the company which led to the 1984 agreement, proposed that all former employees of the company who had been on layoff for more than two years should receive the right to severance pay provided that they made application for it within thirty days of the execution of the 1984-1987 agreement. The company refused to accept this proposal, but instead reached an agreement with the Union that Union members would have forty-eight hours after the 1984-1987 agreement was ratified within which to request their severance pay. A letter which informed these employees that they had to request their severance pay by March 9, 1984 was mailed on March 2, 1984.

None of the plaintiffs, with the exception of J.J. Edrington, made application for severance pay by March 9, 1984. Article XVIII of the 1981 contract provided that employees who decided to take severance pay would lose their seniority and recall rights upon receipt of that pay. It should also be noted that Edrington, in his letter requesting severance pay, stated that his acceptance of severance pay should not be construed as a waiver of his rights under the contract or under the law.

Plaintiffs' contention that ERISA was violated must be rejected. The right to severance pay constitutes a welfare plan that may be modified to the prejudice of some employees. Under the holding in *Sutton* v. *Weirton Steel*, 724 F. 2d 406 (4th Cir. 1983), employees' rights to severance pay may not only be modified without violating ERISA but must be governed by the pertinent employment agreements. *Id.*, at 410.

Plaintiffs' allegation that ASRC acted arbitrarily and capriciously in violation of ERISA does not state a claim. In *Sutton,* the court held that an employer, which is the administrator of a severance pay plan, would not breach its fiduciary responsibilities by agreeing with the unions to a modification which adversely affected some employees' rights to severance pay. The court clearly held that the law does not prohibit an employer from exercising the right to renegotiate or amend unfunded contingent benefits payable before normal retirement age. *Id.,* at 410-11.

Finally, the plaintiffs' claim that ASRC attempted to:

> coerce and manipulate Plaintiffs and others who were subject to termination [on] 3/1/84 to sign away any claim to any legal action against Defendant Company and Defendant Union regarding loss of seniority rights, all of which is a violation of ERISA, 29 U.S.C. § 1001 et seq., including but not limited to 29 U.S.C. § 1141.

Plaintiffs' reliance upon 29 U.S.C. § 1141 is misplaced since that statute is criminal in nature and can be enforced only in a criminal action. *See West* v. *Butler,* 621 F. 2d 240, 244 (6th Cir. 1980). However, Plaintiffs' claims under 29 U.S.C. § 1141 may be treated as though they were brought under 29 U.S.C. § 1140. *Id.* That civil prohibition section provides in essence that it is

> unlawful for any person to discharge, fine, suspend, ediscipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit] plan, this title [29 U.S.C. §1001 *et seq.*], or the Welfare and Pension Plans Disclosure Act [29 U.S.C. §§301-309]. 29 U.S.C. §1140.

This provision is designed primarily to protect an individual's pension rights. *See West, supra,* 621 F. 2d at 245, *citing* 119 Cong. Rec. 30374 ("Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting."

In the case at bar, ASRC did not suspend, discharge, expel, discipline or discriminate against the plaintiffs *because* they had exercised a right to which they were entitled under ERISA or an employee benefit plan or the Welfare and Pension Plan Disclosure Act. The only rights which Plaintiffs had to severance pay were conferred upon them by the 1981 collective bargaining agreement and by the memorandum agreement of 1984 between the Union and the ASRC. These rights were contractual in nature and Plaintiffs cannot point to any breach of contract even though the period of time given for exercising the severance rights was extremely short. However, the right to severance pay was strictly subject to negotiation between the Union and the company and the Court cannot interfere with an agreement legitimately reached between these two entities, notwithstanding the possibility that some plaintiffs conceivably may have lost their right to severance pay because of the shortness of time within which to make a decision as to whether to apply for the severance pay. We reach the conclusion therefore that the plaintiffs' remaining claims against ASRC, with the exception of Mr. Edrington's, should be dismissed with prejudice.

With regard to the Defendant Union's motion for summary judgment, the Plaintiffs contend that they had a right under the Landrum-Griffin Act, 29 U.S.C. §411 *et seq.* to participate in the vote which led to the ratification by the Unions of the 1984-1987 collective bargaining agreement. The problem with the Plaintiffs' theory is that Plaintiffs failed to maintain their status as union members prior to

the March 7, 1984 meeting which resulted in the ratification of the agreement. The Plaintiffs did not preserve their union membership. Under the terms of the union constitution, the Plaintiffs could have maintained their good standing as union members by obtaining a dues exemption. The failure to obtain a dues exemption for a period of ninety days caused them to forfeit all rights and privileges of union members. All of the members, except Gordon Panter, were removed from the membership rolls of the union in August 1981 after they had fallen three months behind in the payment of membership dues. Panter did receive a dues exemption but did not request an extension, even though an extension was authorized by the constitution. He therefore lost his union membership three months after his dues exemption expired.

In the case of *NLRB* v. *Financial Institution Employees of America*, __ U.S. __, 54 USLW 4203 (February 26, 1986), the Supreme Court held that the National Labor Relations Board could not promulgate a rule that required that non-union employees be permitted to vote in a certified union's decision whether to affiliate with other unions. The court based its decision in part upon the theory that the National Labor Relations Act allows unions members to control the shape and direction of their organization and as a result non-union employees have no voice in the affairs of the union. *Id.*, 54 USLW at 4207.

We are reinforced in our opinion by the language contained in *Alvey* v. *General Electric Company*, 622 F. 2d 1279 (7th Cir. 1980). That case points out that the Landrum-Griffin Act, 29 U.S.C. § 411(a)(1) guarantees all union members equal rights and privileges, including the right to participate in the deliberation and voting upon the business of membership meetings. That right, however, is not absolute. Section 411(a)(1) contains a proviso that makes the right subject to reasonable rules and regulations

in the union's constitution and by-laws. Section 411(b) also provides that constitutional or by-law provisions inconsistent with subsection (a) shall be of no force and effect.

In *Alvey,* the court pointed out that the right of a union to limit participation in union affairs to members in good standing is clearly reasonable. *Alvey,* 622 F. 2d at 1284. However, the court was "faced with a substantially more onerous rule that not only limited participation in union affairs to members in good standing but precluded . . . those on layoff" from payment of dues to maintain their good standing. As a result, the members on layoff were "barred from participating in all union matters regardless of their willingness to pay dues or the extent of which the union matters might compromise or nearly extinguish their rights." *Id.,* at 1284-85.

While the *Alvey* court held that the union's provision which precluded the former union members who were on recall from voting or speaking at union meetings on questions affecting their economic interests was of no force or effect, it specifically did so because the plaintiffs, who were on layoff, were precluded from maintaining their union membership.

In the instant case, the plaintiffs have not been precluded from remaining as union members. They could either have paid their dues on a current basis or obtain successive 90-day exemptions from payment of dues which would have allowed them to maintain their membership in good standing.

Finally, we note that 29 U.S.C. § 4020 provides that one is a member of a union organization when he has fulfilled the requirements for membership and has neither voluntarily withdrawn nor been expelled or suspended from membership. The failure to pay dues or to apply for an exemption from the failure to pay dues is a voluntary act on the part of the employees on recall. They were not

coerced into discontinuing their union membership but simply chose not to exercise their right to continue their union membership in the manner required by the union's constitution and by-laws.

We note also that 29 C.F.R. §§452.86 and 452.92 provide that a laidoff employee may maintain good standing for the purpose of remaining eligible to vote on union matters by tendering dues which the union cannot refuse to accept. Here the plaintiffs were granted that right by the union and yet failed to take advantage of the right guaranteed by both the union and the Code of Federal Regulations.

The Court recognizes that the interests of laidoff employees such as plaintiffs in matters that will alter or effectively extinguish their recall rights is a most vital one. *Alvey, supra,* 622 F. 2d at 1285. However, plaintiffs had the option of maintaining their rights to vote on these vital matters by either paying dues or procuring exemptions and failed to do so.

For the reasons set out above, the motion of the company and the union for summary judgment must be sustained.

Dated: 9-5-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - *Defendants.*

JUDGMENT—Entered September 5, 1986

Defendant, American Synthetic Rubber Corporation, having moved to dismiss the remaining claim of the plaintiffs, and the Court having considered said motion to dismiss as a motion for summary judgment, and having entered its memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that all remaining claims of the plaintiffs against the defendant, American Synthetic Rubber Corporation, are dismissed, with the exception of the claim of J. J. Edrington for severance pay.

IT IS FURTHER ORDERED AND ADJUDGED that the motion of the defendants, Local and International Unions, for summary judgment be, and they hereby are sustained for the reasons set out in the memorandum opinion of the Court.

This is not a final and appealable judgment.

Dated: 9-5-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

APPENDIX B

29 U.S.C. §402. Definitions

For the purposes of this chapter—

(o) "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

29 U.S.C. §411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organiza-

tion to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of

such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. §412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §1002. Definitions

For the purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. §1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefits plan . . .

29 C.F.R. §452.86 Vote conditioned on payment of dues.

A labor organization may condition the exercise of the right to vote upon the payment of dues, which is a basic obligation of membership. Such a rule must be applied uniformly. If a member has not paid his dues as required by the labor organization's constitution or bylaws he may not be allowed to vote. Thus, a rule which suspends a member's right to vote in an election of officers while the member is laid off and is not paying dues would not, in ordinary circumstances, be considered unreasonable, so long as it is applied in a nondiscriminatory manner. However, members must be afforded a reasonable opportunity to pay dues, including a grace period during which dues may be paid without any loss of rights. In the case where a member is laid off but desires to maintain his good standing and thus his membership rights by continuing to pay dues, it would be clearly unreasonable for the labor organization to refuse to accept his payment.

29 C.F.R. §452.92 Unemployed members.

Members who are otherwise qualified to vote may not be disqualified from voting merely because they are currently unemployed or are employed on a part-time basis in the industry served by the union, provided, of course, that such members are paying dues.